



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

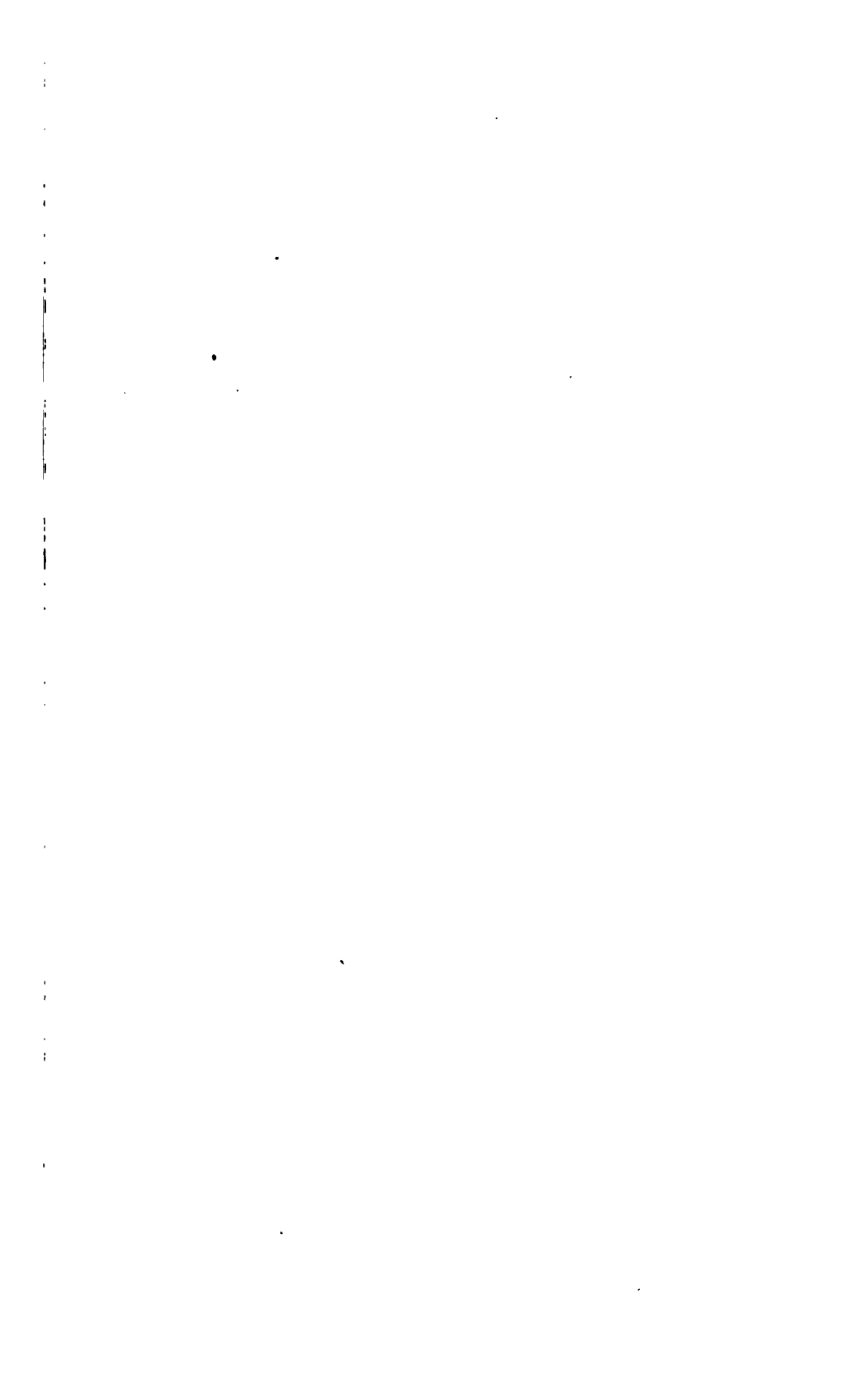
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>









THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXI.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1891.

121847

JUL 29 1942

Entered according to Act of Congress in the year 1901,
By **BANCROFT-WHITNEY COMPANY,**
In the Office of the Librarian of Congress, at Washington.

SAN FRANCISCO:

**THE PACIFIC-BELL TYPE-SETTING COMPANY,
TYPEGRAPHERS AND SETTERS.**

AMERICAN STATE REPORTS.

VOL. XXI.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
CALIFORNIA REPORTS Vol. 86.	17-70
CONNECTICUT REPORTS Vol. 59.	71-134
GEORGIA REPORTS Vol. 85.	135-188
INDIANA REPORTS Vol. 125.	189-261
KANSAS REPORTS Vol. 44.	262-319
KENTUCKY REPORTS Vol. 88.	320-364
LOUISIANA ANNUAL REPORTS . . . Vol. 42.	365-422
MASSACHUSETTS REPORTS Vol. 151.	423-509
MICHIGAN REPORTS Vols. 81, 82, 83.	510-637
NEW YORK REPORTS Vols. 124, 125.	638-771
OHIO STATE REPORTS Vol. 47.	772-858
PENNSYLVANIA STATE REPORTS . . Vols. 137, 138.	859-934



SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

- ALABAMA.** — (83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18.
ARKANSAS. — (48) 3; (49) 4; (50) 7; (51) 14; (52) 20.
CALIFORNIA. — (72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 13; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21.
COLORADO. — (10) 3; (11) 7; (12) 13; (13) 16; (14) 20.
CONNECTICUT. — (54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21.
DELAWARE. — (5 Houst.) 1.
FLORIDA. — (22) 1; (23) 11; (24) 13.
GEORGIA. — (76) 2; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21.
ILLINOIS. — (121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19.
INDIANA. — (112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21.
IOWA. — (72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20.
KANSAS. — (37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21.
KENTUCKY. — (83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21.
LOUISIANA. — (39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21.
MAINE. — (79) 1; (80) 6; (81) 10; (82) 17.
MARYLAND. — (67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20.
MASSACHUSETTS. — (145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21.
MICHIGAN. — (60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21.
MINNESOTA. — (36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20.
MISSISSIPPI. — (65) 7; (66) 14; (67) 19.
MISSOURI. — (92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20.
MONTANA. — (9) 13.
NEBRASKA. — (22) 2; (23, 24) 3; (25) 13; (26) 18; (27) 20.
NEVADA. — (19) 3; (20) 19.
NEW HAMPSHIRE. — (64) 10; (62) 12.

- NEW JERSEY.** — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19.
- NEW YORK.** — (107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21.
- NORTH CAROLINA.** — (97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19.
- OHIO.** — (45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21.
- OREGON.** — (15) 3; (16) 8; (17) 11; (18) 17; (19) 20.
- PENNSYLVANIA.** — (115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21.
- RHODE ISLAND.** — (15) 2.
- SOUTH CAROLINA.** — (26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17.
- TENNESSEE.** — (85) 4; (86) 6; (87) 10; (88) 17.
- TEXAS.** — (68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19.
- VERMONT.** — (60) 6; (61) 15.
- VIRGINIA.** — (82) 3; (83) 5; (84) 10; (85) 17; (86) 19.
- WEST VIRGINIA.** — (29) 6; (30) 8; (31) 13.
- WISCONSIN.** — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20.

AMERICAN STATE REPORTS.

VOL. XXI.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Abraham v. Stewart.....	<i>Specific perform'nce.</i>	83 Mich. 7.....	585
Alpers v. Hunt.....	<i>Attorneys.</i>	86 Cal. 78.....	17
American Rapid Tel. Co. v. Hess..	<i>Telegraphs.</i>	125 N. Y. 641....	764
Antcliff v. June.....	<i>Malicious prosecu't'n.</i>	81 Mich. 477....	533
Arff v. Star Fire Insurance Co.....	<i>Fire insurance.</i>	125 N. Y. 57.....	721
Barnes v. Lynch.....	<i>Co-tenancy.</i>	151 Mass. 510....	470
Barriek v. Gifford.....	<i>Corporations.</i>	47 Ohio St. 180..	798
Bates v. Kelley.....	<i>Judgments.</i>	82 Mich. 91.....	554
Bedford Bank v. Acoam.....	<i>Banks.</i>	125 Ind. 584.	258
Behrens v. Behrens.....	<i>Wills.</i>	47 Ohio St. 323..	820
Belknap v. Ball.....	<i>Libel.</i>	83 Mich. 583.....	622
Benedict v. Torrent.....	<i>Co-tenancy.</i>	85 Mich. 181....	589
Beronio v. Southern P. R. R. Co..	<i>Judgments.</i>	86 Cal. 415.....	57
Brewer v. New York etc. R. R. Co.	<i>Master and servant.</i>	124 N. Y. 59.....	647
Brook v. Latimer.....	<i>Evidence.</i>	44 Kan. 431.....	292
Brown v. James H. Campbell Co..	<i>Chattel mortgages.</i>	44 Kan. 237.....	274
Brown v. Jones.....	<i>Neg. instruments.</i>	125 Ind. 375.....	227
Brown v. Texas etc. R'y Co.....	<i>Railroads.</i>	42 La. Ann. 350..	374
Burke v. Burke.....	<i>Divorce.</i>	44 Kan. 307.....	283
Busch v. Wilcox.....	<i>Agency.</i>	82 Mich. 336....	563
Cameron, In re.....	<i>False pretences.</i>	44 Kan. 64.....	262
Campbell v. Commonwealth.....	<i>Homicide.</i>	88 Ky. 402.....	348
Carpenter v. New York etc. R. R. Co.....	<i>Carriers.</i>	124 N. Y. 53.....	644
Carter v. State.....	<i>State.</i>	42 La. Ann. 927..	404
Chadwick v. Covell.....	<i>Trade-mark.</i>	151 Mass. 190....	442
Chattanooga etc. R. R. Co. v. Liddell.....	<i>Railroads.</i>	85 Ga. 482.....	169
Giriack v. Merchants' Woolen Co..	<i>Master and servant.</i>	151 Mass. 152....	433
City of New Orleans v. Orleans R. R. Co.....	<i>Taxation.</i>	42 La. Ann. 4....	365
Clark v. Devos.....	<i>Covenant.</i>	124 N. Y. 120....	652
Clayton, In re.....	<i>Statutes.</i>	59 Conn. 510....	128
Clement v. Philadelphia.....	<i>Mun. corporations.</i>	137 Pa. St. 323..	876
Collner v. Greig.....	<i>Partnership.</i>	137 Pa. St. 606..	899

NAME.	SUBJECT.	REPORT.	PAGE.
Cortes v. Superior Court.....	<i>Executions</i>	86 Cal. 274.....	37
Oroom v. State.....	<i>Homicide</i>	85 Ga. 718.....	179
Cunningham, Estate of.....	<i>Estates of decedents</i>	137 Pa. St. 621...	901
Curran v. City of Boston.....	<i>Mun. corporations</i>	151 Mass. 505....	465
Cutting Packing Co. v. Packers' Exchange.....	<i>Assignment</i>	86 Cal. 574.....	63
Daly v. Pennie.....	<i>Judgments</i>	86 Cal. 552.....	61
Datz v. Phillipa.....	<i>Specific perform' nec</i>	137 Pa. St. 203...	364
Davis Shoe Co. v. Kittanning Insurance Co.....	<i>Insurance</i>	138 Pa. St. 73....	904
Drake v. Pennsylvania R. R. Co.....	<i>Carriers</i>	137 Pa. St. 352...	883
Durant v. Pierson.....	<i>Partnership</i>	124 N. Y. 444....	686
Edwards v. Lake Shore etc. R'y Co.....	<i>Carriers</i>	81 Mich. 364....	527
Ellis v. Lake Shore etc. R. R. Co.....	<i>Railroads</i>	138 Pa. St. 506...	914
Emery v. Ohio Candle Co.....	<i>Contracts</i>	47 Ohio St. 320...	819
Engel v. Smith.....	<i>Negligence</i>	82 Mich. 1.....	549
Estate of Cunningham.....	<i>Estates of decedents</i>	137 Pa. St. 621...	901
Estate of Hanika.....	<i>Judgments</i>	138 Pa. St. 330...	907
Estate of Keys.....	<i>Assignment</i>	137 Pa. St. 565...	896
Estate of Woodburn.....	<i>Estates of decedents</i>	138 Pa. St. 606...	932
Farmers' Co-operative Trust Co. v. Floyd.....	<i>Agency</i>	47 Ohio St. 525..	846
Ferguson v. Gies.....	<i>Civil rights</i>	82 Mich. 358....	576
Fidelity Ins. etc. Co. v. Western Pennsylvania etc. R. R. Co.....	<i>Corporations</i>	138 Pa. St. 494...	911
First Nat. Bank v. First Nat. Bank.....	<i>Banks</i>	151 Mass. 280....	450
First Nat. Bank v. Cent. Nat. Bank.....	<i>Assignment for benefit of credit'rs</i>	124 N. Y. 552....	700
Fix v. Sissung.....	<i>Jurisdiction</i>	83 Mich. 561....	616
Flaherty v. Moran.....	<i>Nuisance</i>	81 Mich. 52.....	510
Flournoy v. Flournoy.....	<i>Husband and wife</i>	86 Cal. 286.....	39
Freeman's National Bank v. National Tube Works Co.....	<i>Draft</i>	151 Mass. 413....	461
Gardom v. Woodward.....	<i>Fraud. conveyances</i>	44 Kan. 758....	310
Gay v. Rooke.....	<i>Promissory note</i>	151 Mass. 115....	434
German Nat. Bank v. Foreman.....	<i>Banks</i>	138 Pa. St. 474...	908
Greene v. Greene.....	<i>Wills</i>	125 N. Y. 506....	743
Greenough v. Small.....	<i>Judicial sales</i>	137 Pa. St. 132...	859
Hallgren v. Campbell.....	<i>Office and officer</i>	82 Mich. 255....	557
Hamer v. Sidway.....	<i>Contracts</i>	124 N. Y. 538....	693
Hanika, Estate of.....	<i>Judgments</i>	138 Pa. St. 330...	907
Harwell v. Sharp.....	<i>Garnishment</i>	85 Ga. 124.....	149
Hausman v. Burnham.....	<i>Husband and wife</i>	59 Conn. 117....	74
Herron v. Herron.....	<i>Alimony</i>	47 Ohio St. 544..	854
Hess v. Sparks.....	<i>Slander</i>	44 Kan. 465....	300
Hill v. Western Union Tel. Co.....	<i>Telegraphs</i>	85 Ga. 425.....	166
Holbrook v. Payne.....	<i>Assignment</i>	151 Mass. 383....	456
Holmes v. Chartiers Oil Co.....	<i>Contracts</i>	138 Pa. St. 546...	919
Horn v. Indianapolis Nat. Bank.....	<i>Mortgages</i>	125 Ind. 381....	231

CASES REPORTED.

11

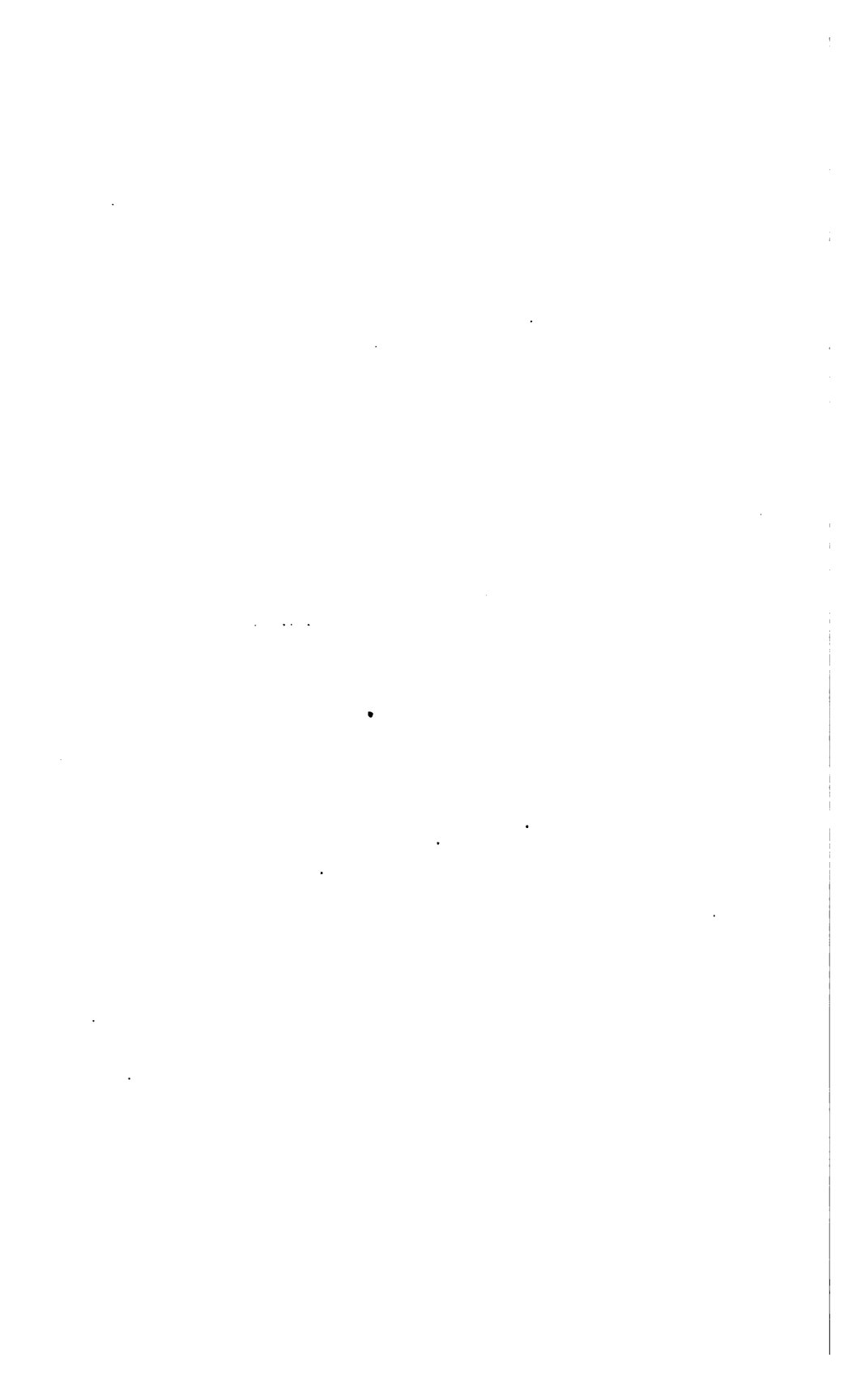
NAME.	SUBJECT.	REPORT.	PAGE.
Howard v. Glenn.....	<i>Corporations</i>	85 Ga. 238.....	158
Huntley v. Holt.....	<i>Judgments</i>	59 Conn. 102.....	71
In re Cameron.....	<i>False pretences</i>	44 Kan. 64.....	282
In re Clayton.....	<i>Statutes</i>	59 Conn. 510.....	128
In re Ortiz.....	<i>Conflict of laws</i>	86 Cal. 306.....	44
Jacks v. Johnston.....	<i>Executions</i>	86 Cal. 384.....	50
Jaynes v. Platt.....	<i>Attachment</i>	47 Ohio St. 262..	810
Jenkins v. Bass.....	<i>Promissory note</i>	88 Ky. 397.....	344
Jennings v. Moore.....	<i>Mortgages</i>	83 Mich. 231.....	601
Jepson v. Killian.....	<i>Est's and adm'r's</i> ..	151 Mass. 593.....	508
Joshua Hendy Machine Works v. American etc. Ins. Co.....	<i>Insurance</i>	86 Cal. 248.....	33
Keys, Estate of.....	<i>Assignment</i>	137 Pa. St. 565...	896
Knickerbocker v. Wilcox.....	<i>Agency</i>	83 Mich. 200.....	595
Knower v. Central Nat. Bank...	<i>Assignment for benefit of creditors</i> ..	124 N. Y. 552.....	700
Ladd v. City of Boston.....	<i>Easements</i>	151 Mass. 585.....	481
Lane v. Moore.....	<i>Evidence</i>	151 Mass. 87.....	430
Leadbetter v. Leadbetter.....	<i>Executions</i>	125 N. Y. 290.....	738
Leatherman v. Times Co.....	<i>Limitations</i>	88 Ky. 291.....	342
Lembeck v. Nye.....	<i>Waters</i>	47 Ohio St. 336..	828
Lemmon v. Strong.....	<i>Neg. instruments</i> ..	59 Conn. 448.....	123
Leonard v. Leonard.....	<i>Divorce</i>	151 Mass. 151.....	437
Lewis v. Jewell.....	<i>Sales</i>	151 Mass. 345.....	454
Long v. North British etc. Ins. Co..	<i>Fire insurance</i>	137 Pa. St. 335..	879
Louisville etc. R. R. Co. v. Berry..	<i>Evidence</i>	88 Ky. 222.....	329
Louisville etc. R. R. Co. v. Logan.	<i>Railroads—passengers</i> ..	88 Ky. 232.....	332
Macon etc. R. R. Co. v. Gibson...	<i>Corporations</i>	85 Ga. 1.....	135
Mandeville v. Avery.....	<i>Chattel mortgages</i> ..	124 N. Y. 376.....	678
McKee v. Delaware etc. Canal Co..	<i>Riparian rights</i>	125 N. Y. 353.....	740
McKenney v. Edwards.....	<i>Corporations</i>	88 Ky. 272.....	339
Menzer v. Menzer.....	<i>Divorce</i>	83 Mich. 319.....	605
Meyers v. Mathis.....	<i>Deeds</i>	42 La. Ann. 471.	385
Midland R'y Co. v. Fisher.....	<i>Covenants</i>	125 Ind. 19.....	189
Miller v. Ottaway.....	<i>Neg. instruments</i> ..	81 Mich. 196.....	513
Missouri P. R'y Co. v. Gedney....	<i>Railroads</i>	44 Kan. 329.....	286
Morasse v. Brochu.....	<i>Libel</i>	151 Mass. 567.....	474
New Orleans, City of, v. Orleans } R. R. Co.	<i>Taxation</i>	42 La. Ann. 4... 365	
Newgas v. City of New Orleans..	<i>Mun. corporations</i> ..	42 La. Ann. 163.	368
Noyes v. Anderson.....	<i>Equity</i>	124 N. Y. 175.....	657
Ogden v. Beatty.....	<i>Sales</i>	137 Pa. St. 197..	862
Ogle v. Baker.....	<i>Judgments</i>	137 Pa. St. 378 ..	886
Opp v. Ward.....	<i>Suretyship</i>	125 Ind. 241	220
Ortiz, In re.....	<i>Conflict of laws</i> ..	86 Cal. 306.....	44
Oyster v. Knoll.....	<i>Wills</i>	137 Pa. St. 448..	890

NAME.	SUBJECT.	REPORT.	PAGE.
Parker v. Larsen.....	<i>Waters</i>	86 Cal. 236.....	30
Patterson v. State.....	<i>Assault</i>	85 Ga. 131.....	152
Paxson v. Nields.....	<i>Notes</i>	137 Pa. St. 335....	888
Pearson v. Western U. Tel. Co....	<i>Telegr'h companies</i>	124 N. Y. 256.....	662
Pearson v. Allen.....	<i>Dedication</i>	151 Mass. 79.....	426
Penso v. McCormick.....	<i>Negligence</i>	125 Ind. 116.....	211
People v. Gordon.....	<i>Mun. corporations</i>	81 Mich. 306.....	524
Perkins v. Wakeham.....	<i>Judgments</i>	86 Cal. 580.....	67
Phenix Ins. Co. v. Tomlinson.....	<i>Insurance</i>	125 Ind. 84.....	203
Pittsburgh etc. R'y Co. v. Shields.	<i>Master and servant</i>	47 Ohio St. 387..	840
Pollasky v. Minchener.....	<i>Libel</i>	81 Mich. 280.....	516
Porter v. Woodhouse.....	<i>Deeds</i>	59 Conn. 568.....	131
Purdy v. Rome etc. R. R. Co.....	<i>Master and servant</i>	125 N. Y. 209.....	736
Ray v. Western Penn. etc. Co.....	<i>Landl'd and tenant</i>	138 Pa. St. 576....	922
Read v. Williams.....	<i>Wills</i>	125 N. Y. 560.....	748
Reinhart v. Lugo.....	<i>Judgments</i>	86 Cal. 395.....	52
Renihan v. Wright.....	<i>Husband and wife</i>	125 Ind. 536....	249
Richards v. Buffalo etc. R. R. Co.	<i>Railroads</i>	137 Pa. St. 524....	892
Richards v. Continental Ins. Co....	<i>Insurance</i>	83 Mich. 508.....	611
Richmond's Appeal.....	<i>Wills</i>	59 Conn. 226.....	86
Ridden v. Thrall.....	<i>Gifts</i>	125 N. Y. 572....	758
Riggs v. Commercial Mut. Ins. Co.	<i>Fire insurance</i>	125 N. Y. 7.....	716
Riley v. Lee.....	<i>Libel</i>	88 Ky. 603.....	358
Robertson v. Woodhouse.....	<i>Deeds</i>	59 Conn. 568.....	151
Sanders v. Russell.....	<i>Homestead</i>	86 Cal. 119.....	26
Schmitt v. Drouet.....	<i>Official bond</i>	42 La. Ann. 1064..	408
Shaw v. Hill.....	<i>Ejectment</i>	83 Mich. 322.....	607
Shipley v. Colclough.....	<i>Animals</i>	81 Mich. 624.....	546
Simmons v. Everson.....	<i>Nuisance</i>	124 N. Y. 319.....	676
Slattery v. Wason.....	<i>Executions</i>	151 Mass. 266.....	448
Smithwick v. Hall etc. Co.....	<i>Master and servant</i>	59 Conn. 261.....	104
Stanley v. Stanley.....	<i>Limitations of actions</i>	47 Ohio St. 225..	806
Stanton v. New York etc. R'y Co.	<i>Corporations</i>	59 Conn. 272.....	110
State v. Boneil.....	<i>Lottery</i>	42 La. Ann. 1110..	413
State v. Brady.....	<i>Libel</i>	44 Kan. 435.....	296
State v. Brown.....	<i>Incest</i>	47 Ohio St. 102..	790
State v. Creditor.....	<i>Dentists</i>	44 Kan. 565.....	306
State v. Deschamps.....	<i>Homicide</i>	42 La. Ann. 567..	392
State v. Ellet.....	<i>Statutes</i>	47 Ohio St. 90....	772
State v. Heidenhain.....	<i>Mun. corporations</i>	42 La. Ann. 483..	388
State v. Miller.....	<i>Rape</i>	42 La. Ann. 1186..	418
State v. Smith.....	<i>Former jeopardy</i>	44 Kan. 75.....	266
Stephens v. Gifford.....	<i>Sales</i>	137 Pa. St. 219....	868
Stewart v. Mulholland.....	<i>Wills</i>	88 Ky. 38.....	320
Supreme Council O. O. F. v. For-	<i>Mutual benefit soc'y</i>	125 Ind. 52.....	196
singer.....			
Sweeney v. Shakspeare.....	<i>Mun. corporations</i>	42 La. Ann. 614..	400

CASES REPORTED.

13

NAME.	SUBJECT.	REPORT.	PAGE.
Thomas v. Ireland.....	<i>Judgments</i>	88 Ky. 581.....	356
Timothy v. Chambers.....	<i>Homestead</i>	85 Ga. 267.....	163
Tucker v. New York etc. R. R. Co.	<i>Railroads</i>	124 N. Y. 306.....	670
Vanuxem v. Burr.....	<i>Judgments</i>	151 Mass. 386.....	458
Wallace v. Glaser.....	<i>Interest</i>	82 Mich. 190.....	556
Watkins v. Watkins.....	<i>Master and servant</i>	125 Ind. 163.....	217
Welch v. Tribune Pub. Co.....	<i>Libel</i>	83 Mich. 661.....	629
Wells v. New Haven etc. Co.....	<i>Nuisance</i>	151 Mass. 46.....	423
Wheeler v. Oceanic Steam Navigation Co.....	<i>Carriers</i>	125 N. Y. 155.....	729
Whittemore v. Judd Linseed and Sperm Oil Co.....			
Wilbur v. Stoepel.....	<i>Corporations</i>	82 Mich. 344.....	568
Winston v. Burnell.....	<i>Mortgage</i>	44 Kan. 367.....	289
Wolf v. Slosson.....	<i>Assignment for benefit of creditors.</i>		83 Mich. 543..... 613
Woodburn, Estate of.....	<i>Estates of decedents</i>	138 Pa. St. 606.....	932
Woodward v. Semans.....	<i>Sales</i>	125 Ind. 330.....	225
Young v. Uphur.....	<i>Judgments</i>	42 La. Ann. 362.....	381
Zimmer v. Settle.....	<i>Husband and wife</i>	124 N. Y. 37.....	638



AMERICAN STATE REPORTS.
VOL. XXI

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

ALPERS v. HUNT.

[88 CALIFORNIA, 78.]

PRACTICE. — SUFFICIENCY OF COMPLAINT MAY BE CONSIDERED ON MOTION FOR A NEW TRIAL if the defendant moved for a nonsuit in the trial court on the ground that the contract set out in the complaint was against public policy, and the motion was denied.

PRACTICE. — ERROR OF COURT IN DENYING NONSUIT, IF EXCEPTED TO, may be reviewed on a bill of exceptions.

ATTORNEY'S CONTRACT TO DIVIDE FEES, WHETHER AGAINST PUBLIC POLICY.

— An agreement between an attorney and counselor at law, and a third person, who is neither, that if the latter will procure the employment of the former by a certain litigant he shall be entitled to one third of such compensation as the attorney may receive from such employment, is contrary to public policy and void, and will not support an action against the attorney to recover part of the compensation by him received.

R. Percy Wright, for the appellant.

Matt I. Sullivan, for the respondent.

THORNTON, J. This is an action brought by the plaintiff, as assignee of William L. Bolte, against John Hunt, executor of the last will and testament of George F. Sharp, to recover a sum of money claimed to be due on a contract alleged to have been made by Sharp and J. C. McCeney with plaintiff's assignor. On the trial, verdict and judgment passed for plaintiff. Defendant moved for a new trial, which was granted, and from the order granting the motion plaintiff appealed.

The main question to be determined herein arises on the complaint. The averments of the complaint set forth that, prior to the first day of August, 1878, George F. Sharp and

Julius C. McCeney were attorneys at law, practicing their profession in the city and county of San Francisco; that in August, 1878, Mrs. Volina E. Harrigan was the owner of and claimed an interest in the estate of Eliza Haskell, deceased, which claim was contested by other persons, and required the services of attorneys at law for its enforcement; that, about the time last mentioned, Sharp and McCeney agreed with one William L. Bolte that if he, Bolte, would procure Mrs. Harrigan to employ them as attorneys at law in the matter of her interest and claim, above mentioned, he, Bolte, should be entitled to and should have one third part of whatever should be received by them, or either of them, by reason of and under said employment; that thereupon Bolte procured Mrs. Harrigan to employ them as attorneys at law in the matter of her interest and claim; that, in pursuance of the arrangement thus brought about by Bolte, Mrs. Harrigan entered into a contract with Sharp and McCeney, whereby, in consideration of their professional services to be rendered in and about her said interest and claim, she agreed to give them one third part of whatever share of the estate of Mrs. Haskell she might become entitled to or receive by way of compromise or otherwise; that Sharp and McCeney duly performed all the conditions of their said contract, and by such services she became entitled to a large amount of property, a part of the estate aforesaid; that Mrs. Harrigan thereupon agreed upon a certain sum of money to be paid Sharp and McCeney in satisfaction of their claim against her under the contract above stated, which they agreed to accept; that, in pursuance of this agreement, Mrs. Harrigan executed to them a promissory note for the sum of \$14,400, bearing date the thirty-first day of January, 1880, payable two years after its date, with interest at the rate of seven per cent per annum; that to secure the payment of this note, Mrs. Harrigan, with others, executed to Sharp and McCeney a mortgage upon certain real property; that afterwards McCeney assigned all his interest in the note and mortgage to Sharp; that the note and mortgage were subsequently sold by Sharp for the sum of \$17,964.18, which was paid to him; that no part of said sum of money was ever paid to plaintiff or his assignor, Bolte.

Other averments are made in the complaint, setting forth the relations of the parties, and material to show plaintiff's right to maintain this action, but as they have no bearing on the question necessary to be determined herein, need not be

stated. On the trial, the plaintiff having put in his evidence and rested, the defendant moved for a nonsuit, on the ground, among others, — 1. That the alleged contract between McCeney and Sharp and Mrs. Harrigan is against good morals and public policy; and 2. That the alleged contract between Sharp and McCeney and William L. Bolte is against good morals and public policy. The motion was denied, and the defendant excepted. A verdict having been rendered for plaintiff, defendant moved for a new trial on a statement. In it he assigns as an error of law occurring at the trial, and excepted to by him, the denial of his motion for a nonsuit. On the hearing of the motion for a new trial, the court granted it "on the sole ground [as appears from the transcript] that the contract sued upon is contrary to public policy." As above stated, the motion for a nonsuit has reference only to the contract alleged, and the error of law set out in the statement is of the same import. The contract is alleged in the complaint alone. The motion for a nonsuit must then be determined on the allegations of that pleading. The court must have granted the new trial for the reason that the contract set forth in the complaint was contrary to public policy, for from the complaint only can we ascertain the contract sued on. And here we may remark that, according to the well-settled practice, the court below could not, in passing on the motion for a new trial, go beyond the grounds on which the new trial was asked; and in holding the action of the court to have reference only to the contract set forth in the complaint, we confine the course pursued by the court to the contract alleged therein, and to the grounds on which the defendant asked for a nonsuit. From the foregoing it is clear that, in passing on the question as to the character of the contract, the court is limited to what is stated by plaintiff in setting forth his cause of action, and that the evidence introduced on the trial cannot be considered.

But it is argued by counsel for appellant (plaintiff below) that on an appeal, as this is, from an order granting a new trial, the sufficiency of the complaint cannot be considered. To support this contention counsel make reference to several cases decided by this court, viz.: *Spanagel v. Dellinger*, 38 Cal. 283; *People v. Turner*, 39 Cal. 372; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Onderdonk v. San Francisco*, 75 Cal. 534; *Wheeler v. Kassabaum*, 76 Cal. 90.

In the cases cited the question presented is entirely unlike

the one presented here. In this case the defendant moved for a nonsuit on grounds that challenged the sufficiency of the complaint, in that it set forth a contract on which an action could not be maintained. The nonsuit was denied, and an exception was regularly reserved. The defendant then found himself in a position where he had a right to have the ruling of the court on his motion reviewed on a motion for a new trial. The ruling of the court on defendant's motion for a nonsuit, and his exception thereto, could be set forth in a statement or bill of exceptions as an error of law occurring at the trial, and there excepted to by him that it might be reviewed as above set forth. This right was assured to him by the provisions of the statute: Code Civ. Proc., sec. 657, subd. 7, secs. 658, 659. On the hearing of the motion for a new trial, the court *a quo* had an opportunity of reversing its former action. If it approved its previous ruling, the motion for a new trial would be denied. If its previous ruling was, in its judgment, erroneous, it was empowered to recall it and grant a new trial. On such hearing it was in the line of the regular procedure to confirm its former action or disapprove and recall it. Such course the law sanctions as applicable to all errors of law. An error committed in passing on a motion for a nonsuit constituted no exception to the rule.

Whether the court denied or granted a new trial, its action was subject to be revised on appeal. The plaintiff had a right to appeal from the order granting a new trial, and his appeal would bring before the court the action of the court below as to every question germane to the inquiry whether the lower court's action was in accordance with law or not. If the court below had, on the trial, committed an error for which it was proper, on its being regularly brought before it, to grant a new trial, this court would approve and affirm the action of such court in granting such relief. If, on the contrary, no such error had been committed, if the court below had on the trial before it ruled correctly, this court would, in accordance with such view, hold the order granting a new trial erroneous, and reverse it. This is the usual course of practice in the courts of this state, and we see nothing in it foreign to the procedure prescribed by law. It has been a practice, not unusual in our courts, to ask a trial court to instruct the jury, when the complaint did not state facts sufficient to constitute a cause of action, to find a verdict for defendant. Whether given or refused, such ruling could be reviewed on motion for a new trial;

and on the hearing of this latter motion, whether favorable or adverse to the motion, an appeal could be prosecuted from the order granting or refusing the new trial, and the action of the trial court passed on in this court, and either approved or set aside. We see nothing irregular here in having the question made on the motion for a nonsuit considered and passed on in this court, though it does go to the sufficiency or insufficiency of the complaint. The question comes before us in the regular course of procedure, and the legal exigencies of the case demand that it be considered and determined. If this court failed to pass on the point, it would in effect hold that there was error of law occurring at the trial, and there excepted to, which could not be reviewed on a motion for a new trial, and that, too, when the statute regulating the procedure in our courts had provided that all such errors should be so reviewed. There is nothing in the cases cited by counsel for appellant in conflict with what is stated above. In our judgment, the question is regularly presented here for decision, and the respondent is entitled to have it determined.

Is the contract set forth in the complaint contrary to public policy or good morals? Such is the question presented to us for determination. That contract is in substance this: A third person, not an attorney and counselor at law, enters into an agreement with an attorney and counselor at law that he will procure his employment by a litigant, and that in consideration of such procurement he is to have from the attorney and counselor so employed one third part of whatever remuneration the attorney receives for his services from the litigant. Is such a contract void, as contended, is the point presented for consideration and decision. Courts are justified in declaring a contract void as against public policy, when it is expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. As said by Chase, C. J., in the *License Tax Cases*, 5 Wall. 469: "This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision." The policy of the state "can be ascertained only by reference to the constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the constitution and laws": *Luz v. Haggin*, 69 Cal. 308. Though public policy is a doctrine on which courts and judges should proceed with caution, still there are many cases to be found in the books of

reports in which the doctrine has been applied. Marriage brokerage bonds, contracts in restraint of trade, contracts by expectant heirs, or in consideration of illicit cohabitation, or such contracts as may injuriously affect the administration of justice, or to procure a contract from a public officer, or to pay for an appointment to office, or aiding in procuring an appointment, or to pay for obtaining a pardon, or injuriously affecting the public interest as to the location of the terminus of a railroad, afford instances of the application of the doctrine: See 5 Rob. Pr., c. 42, pp. 407, 433, where many cases are cited and commented on.

In considering this question, our attention must necessarily be given to the statutes of this state, in regard to attorneys and counselors at law. They are to be found in the Code of Civil Procedure, and in the sections to which reference will be herein specially made. The following provisions will be found in the statute: Any citizen or person resident of this state who has *bona fide* declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to be admitted as an attorney and counselor at law in all the courts of this state: Code Civ. Proc., sec. 275. Every applicant for such admission must produce satisfactory testimonials of good moral character, and undergo a strict examination as to his qualifications in open court: Sec. 276. If, upon examination, he is found qualified, he shall be by the court admitted as such attorney and counselor, by an order entered to that effect upon its records, and a certificate of such record shall be given to him by the clerk of the court, which certificate shall be his license: Sec. 277. On his admission, he must take an oath to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of an attorney and counselor to the best of his knowledge and ability: Sec. 278. A roll of attorneys is to be kept by a prescribed public officer, which the applicant, on his admission, is required to sign: Sec. 280. Any person practicing law in any court, except a justice's court or a police court, without having received a license as attorney or counselor, is declared to be guilty of a contempt of court: Sec. 281. Section 282 of the same code prescribes the duty of an attorney and counselor, by the provisions of which he is required, *inter alia*, to support the constitution and laws of the United States and

this state, and to maintain the respect due to the courts of justice and judicial officers. Rules of duty are further prescribed in this section, which are intended to regulate and control the conduct of an attorney and counselor with regard to the public, and to those in whose behalf they appear in court, and exercise their appropriate functions. Authority is conferred on him in the discharge of his duties and functions, peculiar to his character as such: Sec. 283. He is subject to the authority of the courts, and may be, for cause shown, suspended or removed, and deprived of the right to pursue his profession, by the supreme court or either department thereof, or by a superior court: Sec. 287. One of the causes for which he may be removed or suspended is the following: "Lending his name to be used as attorney and counselor by another person, who is not an attorney and counselor": Sec. 287, subd. 4.

The foregoing provisions taken from a public statute are enacted not only in the interest of those who employ the services of attorneys, but in the interest of the community or public are large. They concern the administration of justice, always a subject of public concernment, and relate to a class of officers of courts in which the people of the state have an abiding interest. Bolte was never an attorney and counselor at law. He had never been admitted to the privileges or authorized to exercise the rights of an attorney and counselor. He had never assumed or been authorized to assume any of the functions of an attorney and counselor, nor was he bound by the obligations of such a position.

Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted from section 287 of the Code of Civil Procedure, for which he would have been liable to be removed or suspended from the practice of his profession. Was not Bolte really allowed to use their names in the prosecution of a matter in litigation? Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors at law for his benefit, and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted attorney. He is thus enabled, through their agency, vicariously, and not

openly and in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. An attorney is prohibited to allow the direct use of his name as an attorney and counselor at law under the circumstances disclosed by the complaint in this case. Of what avail is such prohibition, if it can be, by such indirection as is practiced in this case, evaded? We are of opinion that the facts here disclose a case of indirect violation of the clause referred to, which is as much forbidden as a direct violation. If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such a position, and possessing none of the qualifications which the law demands and requires. Such a practice would tend to increase the amounts demanded for professional services. In such a case, an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person.

We have examined *Bunn v. Guy*, 4 East, 190, and *Candler v. Candler*, Jacob, 225, cited by counsel for appellant to sustain the validity of the contract sued on. We do not consider them applicable to the case before us. The office of attorney in England is entirely different from that of an attorney and counselor in this state. In England the fees of an attorney are fixed by statute, or rules of court, or orders in council, and his bill of costs and charges for disbursements are subject to be taxed by a taxing officer, and the taxation reconsidered by such officer. The decision of the taxing officer can also be revised by the judge on appeal: *Weeks on Attorneys at Law*, secs. 324, 325, et seq.

We cannot suppose that the fact that the attorney has to share the amount of his bill with an outsider would at all affect the amount allowed him. That amount would be the same, regardless of the circumstance that he was bound by his agreement to divide it with another. The laws of England regulating the appointments, duties, and conduct of attorneys have not been brought to our notice, and therefore we cannot determine how far the laws there prevailing permit or recognize as legal a contract made by an attorney to share his fees with a third person. Under such circumstances, this court

could not, with any confidence, pronounce any judgment as to how such a contract would be affected by English statutes or rules of court.

In *Bunn v. Guy*, 4 East, 190, the validity of a contract between attorneys was called in question. A practicing attorney (Carpenter) agreed for a valuable consideration to relinquish his business and recommend his clients to two other attorneys (Bunn and Guy), and that he would not himself practice within certain limits, and would permit them to make use of his name in their firm for a certain time, without any interference on his part. The question arose in chancery concerning the marshaling of assets, and a case stating the above contract was sent by the lord chancellor to the court of king's bench for its opinion. The court certified their opinion to the court of chancery that the contract above stated was good in law.

In *Candler v. Candler*, Jacob, 225, an agreement by an attorney to pay a share of the profits of his business to the widow of his deceased father, who had been an attorney, was held valid. The agreement was made by deed between the widow of Henry Candler, the deceased father, and their son Henry Candler. It was recited in the deed that the agreement was entered into under a due sense of the influence which his mother and family could retain with his father's clients and connections, and the widow (Mary Candler) covenanted to use her utmost endeavors and influence to induce her friends and connections to employ him. The lord chancellor (Eldon), in delivering his judgment, said: "I have thought that, consistently with the policy of the law, agreements could not be made by which they [referring to attorneys] contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the court of king's bench was of a different opinion, though I never could entirely reconcile myself to their doctrine."

The opinion in *Bunn v. Guy*, 4 East, 190, was here referred to by Lord Eldon. In our judgment, the remarks of Lord Eldon, quoted above, may well create a strong doubt as to the correctness of the conclusion reached in *Bunn v. Guy*, 4 East, 190. However, for the reasons above given, we cannot follow the rulings in the cases just noticed. It is clear that the

right of the plaintiff to recover herein is the same as that of his assignor, Bolte. If the latter cannot recover, neither can the plaintiff, his assignee. The considerations expressed herein have led this court to the conclusion that the contract sued on, and alleged in the complaint, is forbidden by the policy of the law, and void, and that the court below erred in denying the defendant's motion for a nonsuit. The motion for a new trial was, therefore, properly granted, and the order appealed from must be affirmed. The view taken herein disposes of the case, and it becomes unnecessary to pass on the other questions raised by counsel for appellant.

Order affirmed.

ATTORNEY'S CONTRACT TO SHARE FEES. — A contract with one that he shall lend his aid in securing the appointment of another as special counsel to defend in a case in procuring testimony against the government of the United States, and in giving information for the management of it, upon consideration that the attorney appointed shall pay him one half of all the fees he shall receive in such case, is contrary to public policy and void: *Meguire v. Corcoran*, 101 U. S. 106, cited in note to *Parsons v. Truak*, 66 Am. Dec. 509.

[IN BANK.]

SANDERS v. RUSSELL.

[86 CALIFORNIA, 112.]

HOMESTEAD. — ON THE DEATH OF A HUSBAND, community property of himself and his wife, held by them as their homestead, vests in her, and is protected as her homestead to the same extent as before his death.

HOMESTEAD, JUDGMENT AND EXECUTION LIEN UPON. — Though a homestead is in value largely in excess of the amount allowed by law, the levy of an execution upon it does not create any lien. Its operation is confined to serving as a foundation for proceedings under the statute for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment.

PRACTICE — ESTATES OF DECEDENTS, PRESENTATION OF CLAIMS AGAINST. — If one has a judgment against the estate of a decedent, under which a levy has been made on a homestead in his lifetime, the plaintiff must present his claim upon such judgment to the administrator and procure its allowance, and is not entitled to proceed to have the homestead appraised and sold or partitioned, and the excess above the amount of the homestead exemption applied to the payment of the judgment.

Grove L. Johnson and Albert M. Johnson, for the appellant.

A. P. Catlin and Lincoln White, for the respondent.

FOX, J. Judgment went for defendant on demurrer to the complaint. The only question on this appeal is, whether the complaint states facts sufficient to entitle the plaintiff to maintain the action. James and Mary W. Lansing were husband and wife. The premises described in the complaint were their community property, duly dedicated as a homestead. James Lansing died, when the premises became the sole property of Mary W. Lansing by operation of law (Civ. Code, sec. 1265), and was protected as such to the survivor in the same manner as before it had been protected to the community by its homestead character: *Estate of Ackerman*, 80 Cal. 208; 13 Am. St. Rep. 116. The death of the husband did not in any manner alter the state or character of the homestead (*Tyrrell v. Baldwin*, 78 Cal. 470), but upon his death, the property immediately vested in the surviving wife: *Mawson v. Mawson*, 50 Cal. 539; *Estate of Headen*, 52 Cal. 295; *Gagliardo v. Dumont*, 54 Cal. 496; *Herrold v. Reen*, 58 Cal. 448. The property having thus vested and being thus protected, this plaintiff, on April 9, 1885, recovered a judgment against Mary W. Lansing for \$5,238.75. September 30, 1885, he caused execution to be issued and levied upon the property, and duly returned with the levy indorsed thereon, and the whole to be duly entered and recorded in the execution-book, in the office of the county clerk.

It is claimed that, at the time of this levy, the value of the property was largely in excess of five thousand dollars, and that, as to the excess, this created a lien upon the property. But this claim is not tenable. Property impressed with the character of homestead, no matter what its value, is exempt from seizure and forced sale. There was no lien of the judgment, and the levy created no lien, but simply created a foundation for proceedings under the statute (Civ. Code, secs. 1245 et seq.) for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment: *Barrett v. Sims*, 59 Cal. 618, 619; *Lubbock v. McMann*, 82 Cal. 230; 16 Am. St. Rep. 108.

In October, 1885, plaintiff commenced proceedings under the statute referred to, to have an appraisement of the property, and secure an order for partition or sale, and application of the excess to the satisfaction of his judgment; but these proceedings were never prosecuted beyond having appraisers

appointed. They never qualified or acted, and no further proceedings were taken in that action. In October, 1887, Mary W. Lansing died, and the present defendant was appointed her administratrix, qualified as such, and entered upon the discharge of her duties as such, in the administration of the estate.

Early in 1889 this action was commenced, which is substantially a proceeding under the same statute (Civ. Code, secs. 1245 et seq.), for the appraisement and sale or partition of the property, and the application of the excess above five thousand dollars to the satisfaction of his judgment. No claim was presented to the administratrix, and plaintiff claims that he was not required to present any, but that, having a lien upon the property, he was entitled to proceed, under section 1505 of the Code of Civil Procedure, directly to sale, were it not for the homestead, but that, the homestead intervening, his only remedy was to proceed as in this action; and it being to enforce a lien, the law did not require the presentation of the claim to the administrator, he having waived in his complaint all claim against the estate for deficiency. But we have already seen that he had no lien. Even if he ever acquired one, either by judgment or levy, it expired before the institution of this proceeding: *Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256; *Rogers v. Druffel*, 46 Cal. 654. If the levy created a lien, it did not extend it beyond the lien of the judgment: *Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256; *Rogers v. Druffel*, 46 Cal. 654; *Isaac v. Swift*, 10 Cal. 81; 70 Am. Dec. 698. Plaintiff therefore had a judgment, without lien, and it was his duty to present the same to the administratrix, in like manner with any other claim: Code Civ. Proc., sec. 1505. And even if his claim was in lien, and the property was a homestead, as he concedes it to have been, he was equally bound to present the claim for allowance against the estate: Code Civ. Proc., sec. 1475; *Camp v. Grider*, 62 Cal. 20. It follows that the complaint did not state facts sufficient to constitute a cause of action, and the judgment must be affirmed.

So ordered.

HOMESTEAD — COMMUNITY PROPERTY. — The death of one of the spouses in no manner alters the estate or character of the homestead in community property: *In re Ackerman's Estate*, 80 Cal. 208; 13 Am. St. Rep. 116; *Bolinger v. Manning*, 79 Cal. 7; *In the Matter of Burdick's Estate*, 76 Cal. 639. But where the homestead was carved, not out of community property, but out of the separate estate of the wife, upon her death, intestate, leaving

more than one child, one third descends to the husband and two thirds in equal shares to the children: *Beck v. Soward*, 76 Cal. 527. If no homestead was declared in community property during the existence of the community, the community property will vest according to section 1402 of the Civil Code, subject, however, to its temporary use as a homestead under the order of the probate court, which may set it apart for that purpose: *In re Gilmore*, 81 Cal. 240; *In re Armstrong*, 80 Cal. 71. When the law under which a homestead was created is amended before the death of one of the spouses, the right of survivorship is governed by the amended law: *Tyrrell v. Baldwin*, 78 Cal. 470; *Threat v. Moody*, 87 Tenn. 143. Under the Texas statute existing in 1863, the homestead vested absolutely in the widow of the deceased husband, where he dies insolvent, exempt from any claims by his heirs or creditors: *Watson v. Rainey*, 69 Tex. 319; *Ohlders v. Henderson*, 76 Tex. 664. See also *Kite v. Kite*, 79 Iowa, 491, for the rule in Iowa.

HOMESTEAD — EFFECT OF DEATH OF HUSBAND OR WIFE. — Effect of the death of the wife upon the homestead: *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304, and particularly note 309. In Arkansas, the minor children and the widow of one who has died are entitled to his homestead: *Winters v. Davis*, 51 Ark. 335; *Sansom v. Harrell*, 51 Ark. 429; *Stayton v. Halpern*, 50 Ark. 329; *Nichols v. Shearon*, 49 Ark. 75.

Under the Iowa statute, the widow may elect to occupy and enjoy her deceased husband's homestead during her natural life, or to take a distributive share of one third in fee-simple of the realty of which the husband was seised at his death: *McDonald v. McDonald*, 76 Iowa, 137. Compare *Nicholas v. Purcell*, 21 Iowa, 266; 89 Am. Dec. 572, and note. Upon the death of either spouse, there cannot be thereafter any abandonment of the homestead on the part of the survivor, if the title was in the deceased, except by an actual setting off of the distributive share to such survivor under his or her election to that effect: *Darrah v. Cunningham*, 72 Iowa, 123.

In Minnesota, under the statute of 1876, a surviving spouse was entitled to a life estate in homestead realty independent of the rights of the minor children: *McCarthy v. Van der Mey*, 42 Minn. 190. But where a homestead right has been lost by a failure to comply with the requirements of the law, the premises do not pass to the surviving spouse: *Baillif v. Gerhard*, 46 Minn. 172.

Under the Mississippi code, the surviving husband takes the homestead owned by his deceased wife, only when she died intestate, leaving no issue: *Kelly v. Alfred*, 65 Miss. 495.

In Missouri, however, a husband is not able by his will to deprive his wife and minor children of their rights in the homestead owned by him at his decease: *Rockhey v. Rockhey*, 97 Mo. 76; and after all the children have attained their majority, the widow is entitled to the exclusive use and occupancy of the homestead: *Rockhey v. Rockhey*, 97 Mo. 76. For the homestead right of each child expires when it attains its majority: *Quinn v. Kinyon*, 100 Mo. 551.

In North Carolina, in *Tucker v. Tucker*, 103 N. C. 170, it was decided that a homestead, whether laid off to the husband in his lifetime, or to his surviving wife after his decease, leaving no children, cannot be divested in favor of the heir by the release or satisfaction of the deceased man's debts.

Under the Texas constitution, a homestead is not subject to partition, when the party receiving it in partition would be entitled to possess it against others, so long as the surviving spouse elects to occupy it, or so long as the guardian of the minor children is permitted to occupy it by a court of

competent jurisdiction: *Hudgins v. Sansom*, 72 Tex. 229. For the homestead is not lost by the death of the wife, if the husband continues to make it his residence: *Taylor v. Bouhars*, 17 Tex. 74; 67 Am. Dec. 642. A surviving husband may sell the homestead to satisfy an indebtedness of the community property out of which it was carved, even though the wife left a child surviving her: *Fagan v. McWhirter*, 71 Tex. 567.

The Virginia code provides that after the husband's death the homestead shall continue for the benefit of the widow and minor children, but when she has married and the children have attained their majorities, the homestead may be subjected to the payment of the deceased husband's debts: *Hanby v. Henrich*, 85 Va. 177.

Where minor children survive both parents, they take the entire estate in an uncompleted homestead entry, to the exclusion of adult children: *Bernier v. Bernier*, 72 Mich. 43. When upon the death of the owner of a homestead no constituent of the family survives, the exemption ceases: *Childers v. Henderson*, 76 Tex. 664.

HOMESTEAD—EXCESS OF AMOUNT ALLOWED BY LAW.—Although a homestead is in excess of the statutory value, the levy of an execution thereon merely lays the foundation for proceedings for the admeasurement of the excess in value: *Lubbock v. McMann*, 82 Cal. 226; 16 Am. St. Rep. 108. That a homestead exceeds the statutory value does not prevent the premises from becoming a valid homestead, nor does it subject the whole premises to sale under execution: *Hargadene v. Whitfield*, 71 Tex. 492. In the absence of fraud the amount of money expended upon a homestead cannot be considered in determining whether it should be subjected to the debts of the owner: *First Nat. Bank v. Hollinsworth*, 78 Iowa, 575. Where a homestead exceeds the statutory limit in value, the sheriff, under an execution, cannot sell a part of it, but must proceed under the provisions of the statute to set apart the exemption before selling the part not decided exempt by the freeholders: *Rhynes v. Guevara*, 67 Miss. 139; *Stone v. McCann*, 79 Cal. 460; *Meyer v. Nickerson*, 100 Mo. 599. See extended note to *Blue v. Blue*, 87 Am. Dec. 273-281, for the law relating to sales of homesteads under execution, wherein are discussed cases in which the homestead claimed exceeds the value or quantity allowed by statute. In Illinois, where the homestead claimed exceeds in value one thousand dollars, the excess is liable to the same liens, and may be alienated in like manner as other property owned by the householder: *Watson v. Doyle*, 130 Ill. 415.

PARKER v. LARSEN.

[86 CALIFORNIA, 286.]

WATER FROM ARTESIAN WELLS—LIABILITY FOR PERCOLATION.—One having artesian wells upon his land, and so using them that the water therefrom forms in a pool and thence percolates beneath the surface so as to injure the lands of an adjacent proprietor, is answerable in damages for the injuries thus occasioned.

O. D. Wright, for the appellant.

T. H. Laine, for the respondent.

BELCHER, C. C. This is an action for damages and an injunction. The court below gave judgment for the plaintiff, and the defendant appeals on the judgment roll. The facts found are, in substance, as follows: The plaintiff and defendant own adjoining tracts of land in Santa Clara County, the plaintiff's tract lying north of defendant's. Both tracts are adapted to and are used for agricultural purposes. They are nearly level, but there is sufficient slope so that water will flow from the land of defendant to and upon the land of plaintiff. The defendant raises alfalfa on his tract, and in order to do so, it is necessary that the ground be irrigated two or three times during the summer. He has two artesian wells upon the upper end of the tract, which are so capped that the water can be shut off or permitted to flow, at his pleasure. He has also excavated along the north side of his land, and two or three feet from the plaintiff's south line, a shallow ditch, which is several hundred feet long, and has no outlet or drain from either end. In excavating this ditch, the earth was thrown up on the north side thereof, that is, between the ditch and the plaintiff's line. When he wishes to irrigate his land, he removes the caps and lets the water flow over the surface for ten days or two weeks, and when it is sufficiently irrigated, the wells are again closed. The excess of water not absorbed and held by the soil flows into the ditch above mentioned, and forms a pool some two or three hundred feet in length and some six or ten inches in depth, and remains there for about a week, and until taken up by evaporation and percolation. Upon the west side of defendant's tract is a lane, and upon the side of it a ditch, much lower than his land, into which, at a very small expense, and with little inconvenience, he could drain the water from his ditch, and probably prevent any injury to plaintiff.

During the last two or three years, and two or three times each summer, defendant has irrigated his land in the manner above described, and on each of these occasions the water has accumulated, as above stated, and has slowly percolated beneath the surface, and through the embankment, into the plaintiff's land, and has saturated the soil to a considerable distance, and to the extent of three acres, which has thereby been made wholly useless for any purpose of ordinary husbandry. And during this period, upon one or more occasions, the water from these wells has flowed over the top of the embankment, and thence upon the surface of the plaintiff's field.

The damage and injury to plaintiff's land, from these percolations, is one hundred dollars. The defendant, in so running and using said water, and permitting it to accumulate upon the north line of his field, was not actuated by any malice or desire to injure plaintiff, but it was done for the purpose of fully utilizing the whole of his field in growing the crop of alfalfa. And, as conclusions of law, the court found that the plaintiff was entitled to a judgment for one hundred dollars damages, and to an injunction restraining the defendant from permitting the water from his wells to flow to and accumulate in the ditch along the north line of his land. And judgment was so entered. From the foregoing statement of the facts, it is manifest that the plaintiff was entitled to the relief which he obtained. The water which did the injury to plaintiff was not a natural stream flowing across defendant's land, but was brought upon the land by artificial means. And the rule is general, that, where one brings a foreign substance on his land, he must take care of it, and not permit it to injure his neighbor. The law upon the subject is tersely expressed in the maxim, *Sic utere tuo ut alienum non lædas*. We think the judgment should be affirmed, and so advise.

VANOLIEF, C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

MAXIMS—*SIC UTERE TUO UT ALIENUM NON LÆDAS*. — For instances of the application of the maxim, *Sic utere tuo ut alienum non lædas*, see *Pittsburg etc. R. R. Co. v. Gilleland*, 56 Pa. St. 445; 94 Am. Dec. 98; *Hill v. Portland etc. R. R. Co.*, 55 Me. 438; 92 Am. Dec. 601; *Stinson v. New York etc. R. R. Co.*, 32 N. Y. 333; 88 Am. Dec. 332; *Radcliff v. Mayor*, 4 N. Y. 196; 53 Am. Dec. 357; *Carson v. Godley*, 26 Pa. St. 111; 67 Am. Dec. 404.

WATERS. — An owner cannot, by artificial means, discharge upon another's lands percolating water which has collected upon his premises; nor can he allow water to so collect and percolate as to injure the cellar, etc., of his neighbor's house: Note to *Wheatley v. Baugh*, 64 Am. Dec. 723, 729.

[IN BANK.]

**JOSHUA HENDY MACHINE WORKS v. AMERICAN
STEAM BOILER INSURANCE COMPANY.**

[88 CALIFORNIA, 242.]

INSURANCE—RIGHT OF ASSURED TO SURRENDER POLICY AND COMPEL RETURN OF PREMIUMS.—If an insurance has been effected, and the perils insured against exist for any period of time, however short, the assured is not entitled to insist that the policy be canceled and part of the premium returned to him, by the common law, nor under a statute declaring that he is entitled to a return of the premium, when no part of his interest in the thing insured is exposed to the perils insured against, or that when insurance is made for a definite time, and he surrenders his policy before the expiration of that time, he shall be entitled to such proportion of the premium as corresponds with the unexpired time.

T. C. Van Ness, Haggin, Van Ness, and Dibble, and F. V. Bell,
for the appellant.

J. N. E. Wilson and James M. Trout, for the respondent.

WORKS, J. This action was brought to cancel a policy of insurance, and to recover \$194.46 as the ratable proportion of a premium paid thereon. Defendant's demurrer, on the ground of insufficiency of the facts stated in the complaint, was overruled, with leave to answer, which it failed to do. Judgment for plaintiff was thereupon entered, from which the defendant appeals. The defendant, on June 2, 1887, in consideration of a three-hundred-dollar premium paid by plaintiff, issued to the latter its policy of insurance, duly countersigned by its agents at San Francisco, whereby it insured plaintiff to the amount of twenty thousand dollars, for a period of three years from June 1, 1887, against loss or damage to property, whether owned by plaintiff or not, or for which plaintiff might be liable, in case of loss or damage resulting from the explosion of either or both of two steam-boilers situate on certain premises in San Francisco; and also against loss of human life or injury to person, resulting from the explosion of either or both of said boilers, for which plaintiff might be liable. Subsequently, on August 22, 1887, and prior to any loss or damage of any kind covered by the policy, plaintiff presented it to the defendant for surrender and cancellation, and requested defendant to accept the surrender of and cancel it. At the same time, plaintiff demanded the return of such proportion of the premium as corresponded with the unexpired term of the policy after deducting thirty per cent. The de-

defendant refused to accept the surrender of the policy upon any terms, or to return any proportion of the premium. Among other provisions in the policy is the following: "This policy shall be canceled at any time at the request of this company, on giving notice to that effect, first deducting thirty per cent for the charges of inspection, and refunding to the assured a ratable proportion of the balance of the premium for the unexpired term of the policy."

The defendant contends that as this provision reserves the right to cancel the policy to the insurance company only, the plaintiff is not entitled to a cancellation of it unless such right exists, independently of the contract of insurance, in some one or more of the cases provided for in sections 1689, 2580, 2610, and 2619 of the Civil Code; and that as the complaint does not present a case within any of those sections, the demurrer thereto should have been sustained. The policy reserves to the insurer the right to cancel the policy under certain conditions and on certain terms, but no such right is given to the insured. Therefore the only question for us to determine is, whether the insured had the right to a cancellation of its policy as a matter of law, independent of any stipulation to that effect in the instrument itself. The code gives the right to rescind or cancel contracts, generally, for certain specified reasons: Civ. Code, secs. 1689, 2580, 8406, 8414. And the right is given to rescind contracts of insurance for certain reasons: Civ. Code, secs. 2610, 2619. It is not alleged in the complaint that any of the reasons above mentioned existed, but it is contended that section 2617 of the Civil Code gave the respondent the right to have the policy canceled without cause, and upon his mere request. We do not so construe the section referred to. If this is its effect, the other sections of the code above referred to are wholly unnecessary. If an insured has the right to rescind his contract at his pleasure, and without giving any reason therefor, it was hardly necessary for the legislature to provide, specifically, the grounds upon which such a right might be exercised. The code provides that "an insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against": Civ. Code, sec. 2616. And when the peril insured against has existed, and the insurer has become liable for any period, however short, the insured is not entitled to cancel the policy, or to a return of any part of the premium, unless the right is given by the sections of the code above

referred to: May on Insurance, sec. 67; *Rothschild v. American Cent. Ins. Co.*, 11 Ins. Law J. 282.

Section 2617 does not provide when a policy of insurance may be canceled by the insured, or profess to do so. It relates exclusively to the matter of a return of premium, and provides how much of the premium shall be returned to him. Two cases are mentioned; viz., where his interest in the property has not been exposed to any of the perils insured against, and where the insurance is made for a definite time, and the insured surrenders his policy. In the first case, he is entitled to the return of the whole of his premium, and in the latter, to a certain proportion of it. The section is intended to provide how much of the premium shall be returned to the insured in the two cases mentioned, and nothing more. In any of the cases in which either party may cancel the policy as provided in the other sections of the code, mentioned above, or as stipulated by the policy, this section steps in and protects the rights of the insured by preserving to him either the whole or a part of the premium paid by him, as the case may be.

This view of the effect of these code provisions, or others like them, was taken in the case of *St. Paul etc. Ins. Co. v. Coleman*, 6 Dak. 458, in which it is said: "But the defendant further claims that he is entitled to a reduction of the amount recoverable, by the terms of the note, by the principles which apply to the return of premiums, claiming that 'risk and premium go hand in hand, and one ceasing, the other also ceases.' This is not by any means true. If the premium had been paid, and the risk incurred, for any period, no matter how short, no breach of a subsequent condition for which the insured was responsible would entitle him to a return of any of the premium, although the company thereby ceased to be liable. The law relating to the return of premiums is clearly laid down in our Civil Code, sections 1542-1544, and we are not aware that it differs materially from the general law of insurance elsewhere. Section 1542: 'A person insured is entitled to a return of premium as follows: 1. To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against; 2. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds to the unexpired time, after deducting from the whole premium any claim for loss

or damage under the policy which has previously accrued.' Section 1543: 'A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insured, or on account of facts of the existence of which the insured was ignorant without his fault, or when, by any fault of the insured, other than actual fraud, the insurer never incurred any liability under the policy.' Section 1544: 'If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.' We cannot see how section 1544, which is particularly referred to by defendant's counsel, in any way sustains his position. The words 'so far as that particular risk is concerned' do not refer to the time in which the subject is exposed to the peril; but where a premium is applicable to risks on two or more distinct subjects of insurance, and no risk has ever been incurred upon one subject, the proportionate premium may be recovered. This is evident, not only from the reading of the previous sections, but from the history of the legislation which led to the adoption in the code states of section 1542. This section, as originally adopted in California, read: 'A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against, or, where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole period of that time.' In proposing as an amendment the language of section 1542, the code examiners said: 'The present section does not conform to the general rule and the law elsewhere, and is manifestly unjust. Under it, the insured, meeting with a loss in the first month of a policy for a year, could recover, not only the loss, but eleven twelfths of the premium, thus depriving the insurer of that proportion of the consideration for which he assumed the risk.' If the defendant had sustained a loss during the first year, the premium for which had been paid in cash, he would have been liable on his note, because the peril had existed, the insurer had been liable, and the event insured against, in consideration of the entire premium, had happened. This being an insurance for five years, and the risk having attached, the insured is not entitled to any reduction on his note."

The judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

INSURANCE—RIGHT OF ASSURED TO RESCIND CONTRACT OF INSURANCE.—A contract of insurance may be avoided by the assured, when he was induced to enter into it through untrue representations of the agent of the company: *New Era Life Ass'n v. Wedgle*, 128 Pa. St. 577; *Norton v. Gleason*, 61 Vt. 674. But in *American Steam Boiler Ins. Co. v. Wilder*, 39 Minn. 350, the company's agent having knowingly made the false assertion that the "life clause" in his policy was not contained in policies issued by rival companies, but having invited defendant to examine and compare the two contracts, leaving his blank with him for that purpose, it was decided that defendant, having made application for a policy, could not refuse to accept the policy or rescind his contract on the ground of the false statement of the agent. A policy may stipulate that it is subject to cancellation at any time by the company on refunding the ratable proportion of the premium for the time unexpired: *Bingham v. Insurance Co.*, 74 Wis. 498.

[IN BANK.]

CORTEZ v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

[86 CALIFORNIA, 274.]

TIME WITHIN WHICH EXECUTION MAY ISSUE IS NOT EXTENDED BY AN ORDER STAYING PROCEEDINGS.

ORDER DIRECTING EXECUTION TO ISSUE AFTER THE LAPSE OF THE TIME WITHIN WHICH THE STATUTE DECLARES IT MAY BE ISSUED IS IN EXCESS OF THE JURISDICTION OF THE COURT.

Garber, Boalt, and Bishop, and J. P. Phelan, for the petitioner.

T. Z. Blakeman, for the respondent.

PATERSON, J. Review. On August 8, 1888, a decree of partition of certain real estate was entered in the superior court, probate department, of the city and county of San Francisco. Mr. Wackenreuder, who performed the duty of commissioner in making the partition, was, by the decree, allowed a fee of \$480 for his services and expenses incurred. It was provided in the decree that the sums so allowed to Wackenreuder, and "amounting to \$480, be and the same are hereby charged and made a lien upon the land and premises partitioned." In July, 1888, the executors of Wackenreuder procured from the court an order of sale to satisfy the claim, with interest thereon from the date of the decree. On August 20, 1889, the court made an order requiring the executors of Wackenreuder to show cause why the order of sale should not be set aside, and an order was entered staying all proceedings. On May 15, 1890, the order under review herein granting an execution was

made. It vacates the order to show cause, and the stay order, procured by the distributees of Ramirez's estate, August 20, 1889, finds the amount which had been paid on account of fees and expenses, the amount still unpaid, and directs execution therefor against the respective shares partitioned to the several parties, and made liable by the provisions of the decree. That portion of the decree which provides for the payment to Wackenreuder of \$480 is, in effect, a judgment in his favor for that sum. It is a money judgment, and if valid, one upon which he would have been entitled to an execution, if the probate court had the power to issue one at all, which is doubtful.

The judgment, being one "for the recovery of money," so far as Wackenreuder was interested in it, could not be enforced by execution after the lapse of five years from the entry thereof: Code Civ. Proc., secs. 681, 685; *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44. We think that Wackenreuder was "the party in whose favor judgment was given," within the meaning of the word "party" as used in section 681 of the Code of Civil Procedure. The order staying proceedings did not operate to suspend the running of the statute: *Solomon v. Maguire*, 29 Cal. 237; *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44. The order under review was in excess of the jurisdiction of the court. The court had no power to enforce the same after the lapse of five years. It had ceased to be operative (*White v. Clark*, 8 Cal. 513), assuming that the probate court had the power to declare a lien and to award an execution in satisfaction thereof,—a question we deem it unnecessary to determine, in view of what has been said on the other point raised.

The order is annulled.

LIMITATION — EXECUTION. — Section 681 of the Code of Civil Procedure of California provides that "the party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement." This section is construed in *Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44, and *Jacks v. Johnston*, 86 Cal. 384; *post*, p. 50.

FLOURNOY v. FLOURNOY.

[86 CALIFORNIA, 263.]

HUSBAND AND WIFE—SEPARATE PROPERTY.—If a married woman purchases property which is, at the time, intended to be her separate estate, and her husband loans her money to be used in making a partial payment, he does not, nor does the community, acquire an interest in the property proportionate to the moneys so loaned by him, nor to any other extent. He is simply a creditor of his wife to the amount of the loan.

HUSBAND AND WIFE—SEPARATE ESTATE.—If a wife purchases property, paying therefor partly out of her separate estate and partly with moneys borrowed on the faith of her existing property, and secured by a mortgage thereon, in which and the note which it is given to secure the husband also joins, the whole purchase is her separate estate.

HUSBAND AND WIFE—SEPARATE ESTATE.—Where property is purchased as the separate estate of a married woman, and intended, at the time of purchase, both by her and her husband, to be hers, the fact that he subsequently, without her knowledge or consent, paid an unpaid balance of the purchase price cannot prevent the entire property from being her separate estate.

HUSBAND AND WIFE—SEPARATE ESTATE.—When the question of the effect of a conveyance to a married woman is involved, the intention of the parties is of paramount importance; and if, as between the husband and wife, it was intended to vest the property in her as her separate estate, the courts will respect that intention and declare the property to be hers, though but for such intention the title would vest in the community.

L. L. Boone, and Hunsaker and Britt, for the appellant.

Capps and Montgomery, for the respondent.

WORKS, J. This is an action brought by a wife against her husband to recover upon a promissory note, and for money had and received. The defendant set up a counterclaim for money loaned. The court below found in favor of the plaintiff on the note, and for a part of the amount claimed by her for money had and received, and allowed the defendant a part of his counterclaim. The plaintiff appeals on the judgment roll. There is no controversy as to the correctness of the finding and judgment upon the note and the counterclaim. The contest is as to the amount allowed the plaintiff for money had and received. The real matter of controversy is as to the character of certain moneys claimed by the wife, whether the same was her separate estate or community property.

The facts, as disclosed by the findings, are these, in substance: That certain real estate was sold to the plaintiff for \$4,750, and a deed therefor executed to her; that it was the

intention and expectation of the parties that the consideration therefor should be paid by the plaintiff out of her separate estate, and that thereupon the property should be her separate property; that on the day said real estate was purchased, the defendant loaned the plaintiff \$600, which sum was by the defendant, at the instance of the plaintiff, paid to the party who conveyed said property to the plaintiff, and, as a part of the consideration therefor, that the plaintiff promised to repay said sum to defendant, and defendant expected the same to be paid out of her separate property; that the plaintiff at that time had separate property of the value of between \$7,200 and \$9,200; that upon the payment of said \$600, a deed for the property was delivered in escrow till the balance of the purchase price should be paid; that, afterwards, the plaintiff paid upon the property, of her separate funds, \$2,000; that said deed contained a covenant on the part of the plaintiff to pay off a mortgage standing against said property for \$1,000; that plaintiff and defendant borrowed \$3,000, and gave their joint note therefor, and joined in a mortgage on said property to secure the payment thereof; that \$2,000 of said sum was paid to the plaintiff, and \$1,000 thereof applied to the payment of the mortgage for that amount, which she had covenanted to pay; that the balance of the consideration for the property purchased by the plaintiff, \$1,150, was paid by the defendant out of his own separate estate, without the request or knowledge of the plaintiff, and thereupon the deed was taken out of escrow and recorded; that afterwards said property was sold for \$6,500. The purchaser assumed the three thousand dollars, and paid the balance in cash at divers times to the defendant, no part of which has been paid to the plaintiff.

The question presented under these findings is, How much of the money thus received, and not paid over to the plaintiff, was her separate estate? and how much of it, if any, was community property? The court below held, as a conclusion of law, that the plaintiff was entitled to recover of the defendant, on account of the moneys thus received, and not paid over, \$933.33, and, as against this sum, allowed the defendant an offset of \$160 on an account stated, and the sum of \$594.40 for money loaned. By what rule of law or what process of reasoning the court found that for three thousand five hundred dollars, collected and appropriated by the defendant, he was only bound to pay less than one third of that sum, we

are not informed by the findings and conclusions of law. We suppose, however, that the court came to the conclusion that all of the money realized by the defendant from the land purchased by the plaintiff was community property, except what was actually paid by her therefor out of her separate property, and the proportionate increase in the value of the land at the time it was sold by her. The position taken by the respondent in this court is, that as to the six hundred dollars loaned to the plaintiff by the defendant to make the first payment, they were dealing with each other in a fiduciary capacity, and as she gave no mortgage on the property to secure its repayment, it was, in effect, a payment made by the defendant on the land, and gave him an interest therein to that extent. But it must be remembered that this is a question wholly between the husband and wife; that the court finds that he loaned her the money, to be repaid out of her separate estate; and that such was the intention of the parties. The effect of the respondent's position is to convert this loan of money by the defendant into an investment, on his individual account, in real estate, against the express understanding and intention of the parties. It is, in effect, to say that by loaning to the wife he could hold her liable to him on her contract to repay him the money loaned, and yet hold an interest in the land to the extent of such loan, with the right to sell the same without her consent; or, putting it differently, the loan of the defendant to his wife was a loan to himself, in spite of their agreement to the contrary, and he could recover from her the amount loaned, — for that was their contract, — and yet hold an interest in the land to the same extent, because, according to the respondent's contention, that was the legal effect of his making the payment without taking a mortgage on the land to secure its repayment. Such a construction of the law would certainly not offer great inducements for a married woman to call upon her husband for aid where her separate property was in danger.

The case of *Schuyler v. Broughton*, 70 Cal. 282, gives some countenance to the respondent's claim, to the extent that it is there held that money borrowed by a married woman to invest in real estate, during her marriage, is community property, unless it be borrowed by her upon the faith of her existing separate property, *which she mortgages or pledges as security for its payment, or against which her contract may be enforced*. That part of the doctrine announced in the case cited

which appears in *Italics* may well be doubted, but, in any event, we are not inclined to apply it to a case of this kind, where the question arises between the husband, who made the loan, and the wife, who received it, and where such a construction of the contract between them would defeat the intention of the only persons who were parties to the transaction, and who alone can be affected by a decision of the question. The parties dealt with each other as if they were unmarried. There was no intention that the husband should, by virtue of the payment made by him, become a part owner in the land. The intention was, that it should be her separate property, and so it must be held to be: *Schuler v. Savings & L. Society*, 64 Cal. 397; *Taylor v. Opperman*, 79 Cal. 468.

As to the two thousand dollars paid by the wife out of her separate estate, there can be no question as to her having a separate estate in the land to that extent. Up to the time, therefore, that the three thousand dollars was borrowed, the money invested in the property was her separate estate, and the defendant had no interest in it. This being so, the money borrowed was borrowed "on the faith of her existing separate property, and secured by mortgage," and even under the strict rule laid down in *Schuyler v. Broughton*, 70 Cal. 282, the money thus realized became her separate property, and the one thousand dollars used to pay off and satisfy the mortgage standing against the property gave her a further separate estate therein to that extent. The fact that the defendant joined in the note and mortgage given to secure the repayment of the money borrowed does not affect the question. The real security was her separate property; the one thousand dollars was invested in the property, and the balance of the money went to her, and was legally hers: *Martin v. Martin*, 52 Cal. 285; *Beaudry v. Felch*, 47 Cal. 183. It is equally clear to us that the amount of \$1,150, paid by the defendant as the balance due on the property out of his own separate funds, accrued to the interest of the plaintiff in the land. Up to that time, the land was wholly her separate estate. It was the intention and understanding of the parties that she should pay for the property out of her separate estate. The husband could not, by voluntarily paying the balance due on the property, convert it into community property to that extent. His payment, being voluntary, and without her knowledge or consent, could give him no right or interest in the property, or change it from separate to community property: *Morgan v. Lones*, 80 Cal. 317.

To give it such an effect would be to violate the express understanding and intention of the parties, and hold the plaintiff liable for an obligation which she never incurred. This we cannot do: *Moulton v. Loux*, 52 Cal. 83; *Curtis v. Parks*, 55 Cal. 106. It must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's separate estate, and that it was intended to accrue to her benefit: *Peck v. Brummagin*, 31 Cal. 441; 89 Am. Dec. 195; *Swain v. Duane*, 48 Cal. 358. In dealings of this kind, the intention of the parties is of paramount importance, where the question as to the effect of a conveyance of real estate arises as between themselves; and where it appears that a conveyance to the wife was intended, as between the husband and wife, to vest the title to the property in her as her separate estate, the courts will respect the intention of the parties, and, as between themselves, uphold her title to the property, although the legal effect of the purchase and conveyance would, independent of such intention, vest the title in the community: *Woods v. Whitney*, 42 Cal. 358; *Peck v. Brummagin*, 31 Cal. 441; 89 Am. Dec. 195; *Higgins v. Higgins*, 46 Cal. 263; 2 Devlin on Deeds, secs. 1168, 1169. For these reasons, we are constrained to hold that the whole of this property was the separate estate of the plaintiff, that the whole of the purchase-money realized from its sale belonged to her, and that she was entitled to recover the full amount thereof collected by the defendant and converted to his own use.

Judgment reversed, with instructions to the court below to modify its conclusions of law in conformity to this opinion, and render judgment in favor of the plaintiff accordingly.

HUSBAND AND WIFE — SEPARATE ESTATE. — The general rule is, that property acquired during marriage is presumed to belong to the community: *Morris v. Hastings*, 70 Tex. 26; 8 Am. St. Rep. 570; *Hardin v. Sparks*, 70 Tex. 429; *Hurley v. Lockett*, 72 Tex. 262; *Dooley v. Montgomery*, 72 Tex. 429; *Morgan v. Lones*, 78 Cal. 58; *Finn v. Williamson*, 75 Tex. 336; *Cosgrove v. Creditors*, 41 La. Ann. 274; but where it is established conclusively that the property was purchased with the separate money of the wife, it remains her separate property: *Love v. Robertson*, 7 Tex. 6; 56 Am. Dec. 41, and note; *Torrey v. Cameron*, 73 Tex. 583; *Von Glahn v. Brennan*, 81 Cal. 261; *Gage v. Downey*, 79 Cal. 140; notwithstanding the husband may have advanced money to make payments for the wife: *Morgan v. Lones*, 80 Cal. 317. The presumption that property acquired during marriage belongs to the community may be overcome by showing the intention of the husband that the property conveyed to his wife should be her separate property: Note to *Cook v. Bremond*, 86 Am. Dec. 640, 641; *Ullmann v. Jasper*, 70 Tex. 447. Whatever is once shown to be separate property remains such through all its ma-

tations, and the profits thereof acquire the same character: *In re Bauer*, 79 Cal. 304. See *Batts v. Beck*, 70 Tex. 754, and *Pett v. Railway*, 70 Tex. 523, for instances of property, acquired and held by the wife during marriage, which was her separate property, not community.

No particular words are necessary to create a separate estate in a married woman; it being necessary only that an intention to vest the property in the wife to the exclusion of her husband shall be apparent: *Bank of Louisville v. Gray*, 84 Ky. 555; *Noland v. Chambers*, 84 Ky. 516.

IN THE MATTER OF THE ESTATE OF CELEDONIO ORTIZ, DECEASED.

[86 CALIFORNIA, 206.]

CONFLICT OF LAWS—ESTATES OF DECEDENTS—LIABILITY OF EXECUTOR FOR ASSETS IN A FOREIGN COUNTRY.—If an executor in this state is also ancillary administrator in a foreign country, and, as such, has within his control personal assets in such country, which he refuses or willfully neglects to bring into this, he may be charged therewith in the settlement of his accounts in this state.

CONFLICT OF LAWS.—IT IS THE DUTY OF A DOMICILIARY EXECUTOR to gather in and account for foreign assets of his testator, to the extent of his ability to do so, and the court of the domicile may compel him to account for his willful neglect to perform such duty.

CONFLICT OF LAWS.—IF THE ESTATE OF A DECEDENT IS SITUATE IN TWO OR MORE COUNTRIES, and his executor incurs expenses of administration, they should be paid out of that part of the estate in the administration of which they were incurred, and not out of the part of the estate situated in another country.

Thomas I. Bergin, and Sullivan and Sullivan, for the appellant.

Smith, Wright, and Pomeroy, and John A. Wright, for the respondents.

VANCLIEF, C. This is an appeal by the executor of said estate, Vicente Cagigal Pezuela, from an order of the superior court of the city and county of San Francisco settling his final accounts. The deceased, a native of Spain, died in Spain on the fifth day of April, 1887, leaving a will executed in Spain according to the laws of that kingdom, and also in compliance with the laws of this state. At the time of his death he was a resident of the city and county of San Francisco, in this state, where he left property of the value of about ninety-seven thousand eight hundred dollars. He also left personal property in Spain of the value of about fifteen thousand dollars, and one half of a house and lot, and also left

property in Mexico. The will disposed of all his property to his seven children and four grandchildren, and appointed the appellant (who was his son-in-law, and a native and resident of Spain) executor, without bond or other security for the performance of the trust. There was no evidence of the laws of Spain, except the testimony of the appellant, who said he was not a Spanish lawyer, but testified that no other letters testamentary than a duly authenticated copy of the will were required by the laws of Spain to authorize him to administer the Spanish assets of the estate, although he would be required to render a final account to a Spanish tribunal, in order to be discharged from his trust. The will authorizes the executor to take possession of all kinds of property, credits, claims, and shares; to liquidate all accounts, and to approve them or not, as he sees fit; to claim, receive, collect, or pay whatsoever shall be owing the estate, or due by the same, of any nature whatsoever, wheresoever situated, giving and signing therefor the proper vouchers; to compound or settle differences which may arise, or submit them to friendly arbitration; to sell or exchange what may be deemed absolutely necessary, receiving the consideration therefor, and when exchanging, to make up any difference. In all matters in which the executor cannot personally act, he may give power of attorney, general or special, "with power of revocation and appointment of new attorneys in fact, and to the formation of an inventory, appraisal, accounts, and partition, carrying out said changes by themselves, without submitting or reporting the same to any tribunal of justice, this being expressly prohibited"; basing said prohibition on his confidence that his executor will do nothing but what is just.

The appellant accepted the trust; and having received from the proper officers of Spain duly authenticated copies of the will, and a proper certificate of the death of the testator, he proceeded immediately to collect and take possession of all that part of the assets of the estate which were then in Spain, and converted all the personal property into money. He then, with his family, removed to this state, for the purpose of residing here while administering the California assets. He arrived in California in June, 1887, and on the twenty-second day of that month filed in the office of the clerk of the superior court of the city and county of San Francisco an authenticated copy of the will, which was afterwards admitted to probate by that court, and the appellant was appointed executor,

and he qualified to act as such on the twenty-sixth day of September, 1887.

Thus he became the domiciliary executor of the will, and at the same time was invested with the character of ancillary executor of the assets in Spain. On October 17, 1887, in obedience to section 1443 of the Code of Civil Procedure, he filed an inventory of all the property of the estate, including that situate in Spain. On February 13, 1889, the appellant filed his final account, in which he failed to charge himself with the assets in Spain, and prayed that the account be settled and allowed, and that the residue of the estate be distributed. In due time, two of the devisees and legatees named in the will filed objections to the account, on several grounds, but principally on the ground that the executor had failed to charge himself with the assets of which he, in his character of ancillary administrator, took possession in Spain. It appears that all the devisees resided in California and Mexico, and that all were represented in the proceedings in the superior court. After hearing the contest, the court charged the executor with \$9,847.29, which it found to be the residuum of the Spanish assets after deducting all proper demands and charges against the estate in Spain. The court also disallowed three small charges of the executor for traveling expenses from San Francisco to the city of Hermosillo, in Mexico, amounting to \$315.

1. Counsel for appellant contended that the court erred in charging the executor with the residuum of the Spanish assets, for the alleged reason that the administration of those assets had not been closed in Spain. This presents the principal question, and the only question of any difficulty to be decided. The evidence of the facts upon which the court acted consists of the will, petitions and inventories filed by the executor, and his testimony at the trial and on a former occasion. The executor was examined and cross-examined at great length, and it is impracticable to epitomize his testimony by stating the mere substance of it so as to show its full effect and bearing upon his motives and intention.

I think, however, that his testimony, in connection with the documentary evidence, substantially tends to prove and is sufficient to justify findings of the following facts: 1. That the residuum of the assets in Spain had been under his active control, and at his disposal, as the domiciliary executor, during the term of at least six months before he filed his

final account, though not actually separated from that part of such assets which may have been necessary to discharge the demands against the estate in Spain and the expenses of administration there, which, however, could not have exceeded the value of the assets left in his hands, in his character of ancillary executor, for the purpose of paying such demands and expenses; 2. That he could have had the residuum with which he was charged transferred to him in this state at any time within six months before the filing of his final account, by simply drawing for it upon his brother, whom he had authorized to act for him in all matters pertaining to the estate in Spain, and who had on deposit in a bank there, subject to appellant's order, proceeds of the estate in Spain, amounting to fifteen thousand dollars; 3. That with ordinary diligence in the discharge of the duties of his trust, the appellant might have had the administration of the estate in Spain closed, and the residuum thereof transferred to him in this state, before he filed his final account, but that he willfully refused to have this done, intending not to account for or to distribute that residuum in this state, but to account for and distribute it, if at all, in Spain.

It is strenuously contended that the lower court assumed jurisdiction over the appellant and dealt with him in his character of ancillary executor on the estate in Spain, and not merely as domiciliary executor; but I think this is a mistake. The court dealt with him only as the principal domiciliary executor, and only held him responsible for what he should have charged himself with in his final account here. Upon the facts which the court was justified in finding, the case against him appears to be quite as strong as it would have been if his brother had been the ancillary executor of the estate in Spain, and he had willfully refused or neglected to procure a transfer of the residuum from his brother, as such foreign executor, to himself, knowing that, with ordinary diligence, or by mere demand, he could do so. There is no complaint that he was charged with more than what would necessarily be the residuum after satisfying all lawful demands in Spain; nor is any reason suggested why, upon the settlement of his final account in Spain, the Spanish tribunal will credit him with all that he has been required to account for and distribute in this state. There is no question here as to the estate in Mexico. For aught that appears, that portion of the estate has been administered and distributed to the satisfaction of all concerned.

I think the law applicable to the facts is correctly stated by Professor Schouler in his late treatise on executors and administrators (2d ed., 1889, sec. 175), as follows:—

“The earlier rule, frequently asserted in England, in one loose form or another, is, that assets in any part of the world shall be assets for which the domestic executor or administrator is chargeable; the practical effect being to enjoin upon the principal personal representative the duty of procuring, so far as foreign law and the peculiar circumstances will permit, personal assets wherever situated, realizing the bulk of the estate of his decedent as best he may, gathering in the property as one who represents the whole fortune, and having gathered it, account to those interested accordingly.

“Some of the judicial expressions on this point, to be sure, import too onerous a responsibility on the representative's part; and Mr. Justice Story has pointed out the fallacy of holding a domestic executor or administrator answerable for foreign property, which it is admitted that he can neither collect nor sue upon, nor compel its payment or delivery to himself, by virtue of his domestic appointment, — foreign property, we may add, of whose existence, or of the grant of foreign administration for realizing it as assets, he may be quite unaware. And yet, to let external assets knowingly escape his control, and be lost to the estate, when with reasonable diligence they might have been procured, seems a plain dereliction of duty in the principal or domiciliary representative, whose function, as rightly understood, is to grasp the whole fortune, as the decedent did during his life, save so far as the obstructive law of foreign *situs*, or the limitations of his own appointment, may restrain him.

“If, therefore, assets cannot be collected and realized for the benefit of the estate without a foreign ancillary appointment, the executor or administrator of the decedent's last domicile ought, so far as may be consistent with his information, the means of the estate at his disposal, and the exercise of a sound discretion, to see that foreign letters are taken out, and that those assets are collected and realized, and the surplus transmitted to him. If, as frequently happens, the domestic representative may collect and realize such property in the domestic jurisdiction, as by selling negotiable bonds, bills, notes, or other securities, payable abroad, or by delivering bills of lading or other documents of title (indorsing or assigning by acts of his own, which would be recognized in conferring

the substantial title in such foreign jurisdiction), or otherwise, by effectually transferring property of a chattel nature situated or payable elsewhere, which is capable, nevertheless, of being transferred by acts done in the domestic jurisdiction, he should be held accountable for due diligence as to such net assets; and so, too, he may enforce the demand against the debtor, without resort to the foreign jurisdiction. If, however, foreign letters and an ancillary appointment at the *situs* be needful or prudent in order to make title, and to collect and realize such assets, the principal representative should perform the ancillary trust, or have another perform it, observing due diligence and fidelity, according as the laws of the foreign jurisdiction may permit of such a course; and if, in accordance with those foreign laws, a surplus be transmitted to the principal and domiciliary representative, or otherwise transferred, so as to be held by him in such capacity for payment and distribution, he will become liable for it accordingly.

"Whether, then, the principal or domiciliary representative be required, *pro forma*, or not, to include in his inventory assets which come to his knowledge, either situate in the state or country of principal and domiciliary jurisdiction, or out of it, his liability as to assets of the latter sort depends somewhat upon his means of procuring them, and the fact of an ancillary administration in the *situs* of such assets. In any case, he is bound to take reasonable means, under the circumstances, for collecting and realizing the assets out of his jurisdiction; nor is his liability a fixed, absolute one, but dependent upon his conduct, and it is getting the foreign assets into his active control that makes a domestic representative chargeable as for the property or its proceeds, rather than upon the duty of pursuing and recovering such assets. If assets situated in another jurisdiction come into the possession of the executor or administrator in the domiciliary jurisdiction, by a voluntary payment or delivery to him, without administration there, it follows that he should account for them in the domiciliary jurisdiction whose letters were the recognized credentials in the case. And it is held in several American cases, consistently with this rule, that, no conflicting grant of authority appearing, the domiciliary appointee of another state may take charge of and control personal property of the deceased in the state of its *situs*." See also *Wilkins v. Ellett*, 9 Wall. 741, and *Van Bokkelen v. Cook*, 5 Saw. 589.

The authorities cited by appellant's counsel seem not incon-

sistent with the above extract from Professor Schouler's work. None of them denies the duty of the domiciliary executor to gather in an account for the foreign assets to the extent of his conscious ability to do so, nor the consequent and corresponding authority of the court of the domicile to compel him to account for willful neglect to perform such duty. All the authorities agree that the residuum of the foreign assets must finally be collected and distributed by the domiciliary executor.

2. As to the disallowance of the three items of traveling expenses, it is to be observed that, as they pertained solely to the administration of the estate in Mexico, they should be paid from that part of the estate, and not from the estate in California. If those charged may be allowed here, why may not all the expenses of administration, both in Mexico and Spain, be charged to the California estate?

I think the order appealed from should be affirmed.

GIBSON, C., and HAYNE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the order appealed from is affirmed.

Hearing in Bank denied.

EXECUTORS AND ADMINISTRATORS — ANCILLARY ADMINISTRATOR. — For the law respecting ancillary administration, wherein is discussed the duty of the ancillary administrator to collect assets, pay debts and costs of ancillary administration, and distribute properly the residue in his hands, see extended note to *Goodall v. Marshall*, 35 Am. Dec. 483-490. A court of chancery may compel a foreign administrator or executor to account for the trust funds which he received abroad and brought with him into this state: *McNamara v. Dwyer*, 7 Paige, 239; 32 Am. Dec. 627, and note 632, 633.

[IN BANK.]

JACKS v. JOHNSTON.

[36 CALIFORNIA, 384.]

EXECUTION, TERMINATION OF TIME FOR ISSUING, IN FORECLOSURE SUITE. —

If a statute limits the time within which execution may issue in cases for the recovery of money to five years after the entry of judgment, no execution can issue after that time under a decree foreclosing a mortgage, though it specially provides that no judgment shall be docketed for any deficiency should the proceeds of the sale be insufficient to pay the amount found due.

T. I. Bergin, and Geil and Morehouse, for the appellant.

R. M. F. Soto, and Hermann and Soto, for the respondent.

McFARLAND, J. In this case, an action was brought upon a promissory note for thirteen hundred dollars, and interest, and a mortgage given to secure it. Judgment in the usual form was rendered for plaintiff on March 29, 1879, except that, by stipulation, the decree provided that no judgment should be docketed for any deficiency if the proceeds of the sale should fail to satisfy the amount found due. On April 11, 1887, more than eight years after the entry of the judgment, plaintiff moved the court in due form to direct the clerk to issue a writ of execution for the sale of the mortgaged premises. The court denied the motion, and from the order denying the motion plaintiff appeals. The only question presented is, Can an execution issue on a judgment foreclosing a mortgage given to secure the payment of money, after five years from the date of the rendition of the judgment? The general rule, under section 681 of the code, is admitted to be that an execution cannot issue after five years; but it is contended by appellant that, under section 685 of the Code of Civil Procedure, which provides that "in all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion," the court should have ordered an execution in the case at bar. This contention, however, was substantially determined against appellant by this court in *Dorland v. Hanson*, 81 Cal. 202; 15 Am St. Rep. 44. That was the case of a decree foreclosing a street assessment, and the court decided that "section 681 must be held to apply to a judgment the object, purpose, and effect of which is to enforce the payment of money, whether the same be a personal judgment against the party indebted, or a decree foreclosing a lien for the amount due." This rule applies even more strongly to the case of a note and mortgage, where the latter is given to secure an express personal promise to pay money. With respect to the sections of the code in question, the mortgage is a mere incident to the debt. The cause of action could have been removed at any time before suit, by the payment of the amount of money due, and the judgment could have been satisfied in the same manner. We are asked to overrule *Dorland v. Hanson*, 81 Cal.

202, 15 Am. St. Rep. 44, which we decline to do. The court properly refused to order the execution.

Order appealed from affirmed.

LIMITATION — EXECUTION. — Sections 681 and 685 of the Code of Civil Procedure of California, relating to the time within which executions may be issued upon judgments, are construed in *Ovies v. Superior Court*, 86 Cal. 274, ante, p. 73; *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44.

REINHART v. LUGO.

[86 CALIFORNIA, 305.]

PRACTION. — **ORDER SETTING ASIDE DEFAULT AND A JUDGMENT THEREON**, supported by an affidavit of merits, will not be interfered with by an appellate court, unless it was made without jurisdiction or is an abuse of discretion.

SHERIFF AND DEPUTY. — **AOT OR RETURN OF A DEPUTY** is a nullity unless done in the name and by the authority of the sheriff.

RETURN OF SERVICE OF SUMMONS signed by a person without adding any official title or designation, and not sworn to, is a nullity, and cannot be validated by proving that he was in fact a deputy sheriff.

JUDGMENT BY DEFAULT ENTERED BY A CLERK IS VOID when he is not authorized to enter it by statute, as where he acted upon a return of the service of summons not sworn to nor appearing on its face to be an official act.

JURISDICTION. — **IF THE PROOF OF SERVICE OF PROCESS IS NOT MADE AS REQUIRED BY LAW**, the court acquires no jurisdiction over the person of the defendant and has no authority to render judgment against him.

PRACTION. — **UPON FILING AN AMENDED COMPLAINT** in a suit for partition, bringing in new parties under an allegation that they have or claim an interest in the subject-matter of the suit, all defaults previously entered, based upon the original complaint, must be regarded as vacated, and the amended complaint must therefore be served on all parties, whether they are in default as to the original complaint or not.

JURISDICTION. — **THE FINDING OR RECITAL OF DUE SERVICE OF PROCESS** is not conclusive when the proof of service is a part of the judgment roll, and, as it appears in such roll, is not sufficient evidence of such service, as where it is not sworn to nor does it appear to be certified by any officer as his act.

JUDGMENTS. — **MOTION TO VACATE A JUDGMENT** on the ground that it is void is not a collateral but a direct attack.

PRACTION. — **REVERSAL OF A JUDGMENT IN PARTITION**, so far as it affects plaintiff's right to have partition of certain designated tracts of land, though it is affirmed in all other respects, vacates the whole judgment as to those tracts, and as to them releases all the parties to the action from the operation thereof.

JUDGMENT BY DEFAULT WHEN THE PROOF OF THE SERVICE OF SUMMONS IS DEFECTIVE IS VOID, and a motion to vacate it cannot be successfully

resisted by proving that the summons was in fact properly served. Such proof cannot operate by relation to make valid a judgment void when it was entered.

Wicks and Ward, for the appellant.

Howard and Robarts, John D. Bicknell, and Finlayson and Finlayson, for the respondents.

FOX, J. This is an appeal from an order setting aside the default, and judgment thereon, entered against the defendant Antonio Maria Lugo, and permitting him to answer in the cause. This court will not interfere with the action of the court below in making such an order as that appealed from in this case, where, as here, it appears to have been made upon affidavit of merits, unless it affirmatively appears that the court was without jurisdiction to make, or abused its discretion in making, the order. The action was for partition of several parcels of land, designated, respectively, as A, B, C, D, and E. There were several defendants in the first instance, and by amendment subsequently made, several others were brought in as defendants. Respondent Antonio Maria Lugo was one of the original defendants, and plaintiff, in his complaint, which has never been amended in that particular, avers that the respondent claims some segregated interest in that portion of the lands sought to be partitioned, and designated as tract A, the exact nature and extent of which is not accurately known to plaintiff; and in another and prior portion of the complaint he alleges that he and the defendants named, of whom the respondent is one, "hold and are in possession, and are the owners and tenants in common, as hereafter set out," of the several tracts of land designated as above stated. A certificate headed "Office of the sheriff, Los Angeles County, California," and dated May 14, 1885, is indorsed upon the *alias* summons, reciting that the respondent was served, by delivering to him a true copy of said summons, at the county of Los Angeles, on the 14th of April, 1885, and is signed "M. G. Aguirre." This is not made as, and does not purport to be, an affidavit of service. Aguirre was not the sheriff of the county, and if he was deputy sheriff, or acting as such, as is now claimed, the fact is entirely immaterial. As proof of service, the certificate was and is void. "The act and return of a deputy is a nullity, unless done in the name and by the authority of the sheriff": *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 403. The certificate being a

nullity, it was as if no return or proof of service had been made. There was therefore no authority to enter the default of the defendant. The clerk in entering defaults exercises no judicial functions, but acts merely in a ministerial capacity, and unless he confines himself strictly within the statute, his acts can have no binding force: *Willson v. Cleaveland*, 30 Cal. 198; citing *Stearns v. Aguirre*, 7 Cal. 443; *Kelly v. Van Austin*, 17 Cal. 564; *Glidden v. Packard*, 28 Cal. 651. Before default can be regularly taken against a party, there must be positive and sufficient evidence in court of due service, and no substantial defect in that respect can be cured by subsequent knowledge of the fact: *Johnson v. Delbridge*, 35 Mich. 436. If proof of service of summons is not made as required by law, the court acquires no jurisdiction of the persons of defendants, and has no authority to render judgment against them. Any judgment rendered is therefore invalid and void: *Lyons v. Cunningham*, 66 Cal. 42, and cases there cited.

The default of this respondent was entered by the clerk June 17, 1885, upon no other proof of service than that furnished by this certificate. Subsequently the complaint was amended, but it does not appear that the amended complaint was ever served upon this respondent. Such service is required by section 472 of the Code of Civil Procedure, and without it no judgment by default could be entered against him. "The right to answer an amended pleading is one of which a party cannot be deprived, even after entry of default against him on the original pleading; for where a plaintiff amends in matter of substance (and in an action of partition, the bringing in of new parties alleging that they have or claim an interest in the subject of partition is matter of substance), he, in effect, opens the default on the original pleading, and must serve his amended pleading upon all the parties, including the defaulting defendant": *Thompson v. Johnson*, 60 Cal. 292. Findings were filed and decree entered January 29, 1886. In the findings, the court recites the fact that certain defendants, among them this respondent, had been duly served with summons, and had not appeared, and their defaults had been duly and regularly taken and entered. Appellant claims that by reason of this finding the judgment was not void, but, at most, simply voidable, and that it cannot be attacked collaterally. There would be some force in this argument if a finding of due service was conclusive proof of the fact as against a defendant who had not answered; but

under section 670 of the Code of Civil Procedure, such a finding is not conclusive as against the evidence required to be in, and when found in, the judgment roll. By reference to subdivision 1 of that section, it will be seen that if the complaint be not answered by any defendant, the summons, with the proof of service thereof, must be made a part of the judgment roll. If it be answered, then that fact is sufficient proof of service or of waiver. In this case, that which was claimed to be proof of service was made a part of the judgment roll, and comes up as such to this court. As we have seen, the proof is a nullity, and furnished no authority for entering the default of the defendant. It follows that the judgment entered thereon was invalid and void: *Lyons v. Cunningham*, 66 Cal. 42. Motion to vacate a judgment on the ground that it is void is not a collateral but a direct attack: *People v. Mul-lan*, 65 Cal. 396; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448.

But it is claimed that the court has no power to vacate a judgment so entered upon motion, after the lapse of one year. Even if this were true (but we do not concede that it is, where, as here, the judgment is void on the face of the record, and the authorities cited in support of the proposition do not sustain it), it would not help the appellant in this case; for an appeal was taken by the plaintiff from the judgment, which we have so far been considering, and the same was reversed, so far as affected the right of plaintiff to have partition of tracts A, D, and E, and affirmed in other respects: *Reinhart v. Lugo*, 75 Cal. 639. Tract A is the one in which the complaint admits that this respondent is, or claims to be to some extent, an owner, tenant in common, and in possession. When the judgment as to the plaintiff's rights to partition in this tract was reversed, it vacated and set aside the whole judgment as to the tract, for a judgment in partition cannot be piecemeal; and as to that tract, it was as if no judgment had been entered. The court below correctly so understood it, and when the case was tried again, again passed upon and determined the rights of all parties, including those of this respondent, in the tract. Again it acted, as before, upon the default of this respondent, evidenced and entered as before; and, as a consequence, its judgment, like the first, was, as against this respondent, "invalid and void." This judgment was entered February 12, 1889, and it was the only judgment standing against the respondent in the

case, so far as related to tracts A, D, and E. Notice of motion to vacate it was given July 8, 1889, to be heard on the 15th of the same month, and was determined on the 16th of September, 1889; so that, even according to appellant's own theory, it was not too late.

But it is claimed that the court ought not to have vacated the judgment, because at the hearing appellant made proof of the fact of service of summons at the time mentioned in the certificate above referred to. That would not justify the court in refusing to vacate the judgment. The default and judgment were void, not because there was no service, but because there was, at the time of entering the same, no proof of service. This new proof might have been sufficient to have authorized the court, at any time after it was made, if the defendant had not answered, or had leave to answer, to enter a valid default, and thereupon to proceed to a valid judgment, but it would not operate, by relation, to make that valid which, when entered, was void.

In any view we take of the case, it does not appear that the court was without jurisdiction to make the order appealed from, and there being a sufficient affidavit of merits, it does not appear that there was any abuse of discretion.

Order affirmed.

THE OPENING STATEMENT in the foregoing decision, that when an order has been made setting aside a default and permitting an answer to be filed, the appellate court will not interfere with it unless made without jurisdiction, except where it is a manifest abuse of discretion of the trial court, is unquestionably correct, and the case might have been disposed of by that statement without expressing an opinion upon the other matters to which the court referred.

The balance of the opinion contains a remarkable statement concerning the jurisdiction of courts, and we know not whether to attribute it to a temporary suspension of the faculty of memory on the part of the court, or to its desire to overrule numerous well-considered cases without exhibiting any knowledge of their existence. The court declares, in effect, that it is not the service of process which gives courts jurisdiction, but the proof of such service; that if the proof is defective, it is immaterial that the service was perfect; and the proof being imperfect, there is no way in which the judgment can be sustained by showing the facts regarding the service of process as they really existed when it was entered. The very reverse of this we apprehend to be the law. It is the fact of the service of process which confers jurisdiction, and it is a familiar practice in California, as well as elsewhere, when the proof of such service is absent or defective, to permit it to be amended or supplied. The court here says the proof, when so amended or supplied, "would not operate, by relation, to make that valid which, when entered, was void." True, it cannot make valid that which was void. But if the process was served, the judgment never was void. The object of sup-

plying and amending proof of service of process, is not to make void valid, but to make valid valid; or in other words, it is to show the true character of the judgment; that it is not and never was void, as might be inferred in the absence of proof of the service, but is and ever has been valid.

To support judgments entered upon insufficient proof of service of process, or without the proof of such service appearing in the record, courts have uniformly permitted such proof to be amended or supplied, not for the purpose of authorizing them to enter new judgments based upon such proof, but to show that judgments previously entered were not entered without jurisdiction, and are not and never were void; *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 829; *Shenandoah V. R. R. Co. v. Ashby's Trustees*, 86 Va. 232; 19 Am. St. Rep. 891; *Burr v. Seymour*, 43 Minn. 401; 19 Am. St. Rep. 246; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; *Friak v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198; Freeman on Judgments, 4th ed., sec. 80 b.

BERONIO v. SOUTHERN PACIFIC RAILROAD COMPANY.

[86 CALIFORNIA, 415.]

JUDGMENT, MERGED BY.—ONE TORT CAN GIVE BUT ONE CAUSE OF ACTION, though it injures different parcels of property. Hence if a railway is wrongfully constructed and operated along a street in front of two lots situated a short distance from each other, but belonging to the same proprietor, and he brings an action to recover damages occasioned to one lot by the railroad, his claim for damages to both is merged in the judgment, and there can be no further recovery.

H. L. Poplin, and Barnes and Shelby, for the appellant.

R. B. Canfield, and Blackstock and Shepherd, for the respondent.

FOX, J. The town of San Buenaventura is a municipal corporation. The legal title to the lands comprising Front Street in said town was granted to the then town authorities October 13, 1869, "as a public street, to be forever kept open and maintained as such, and not to be used for any other purpose, nor be diminished in width." On the 4th of October, 1886, the president and board of trustees of the town, by ordinance, granted to the defendant a right to lay, maintain, and operate a single or double track railroad along and upon said Front Street for the whole length thereof, from a point near Kalamama Street, etc. The plaintiff owned two lots fronting on the north side of said street, one situate in block 19, and one in block 20, the two being separated by a distance of 260 feet. The railroad was constructed along said Front Street prior to September 13, 1888, and on that day plaintiff commenced an action against defendant for damages to his lot situate in

block 19, by reason of a cut and fill made in the construction thereof, and on the twenty-sixth day of January, 1889, the amount of plaintiff's damages were agreed upon and settled between the parties, and paid by defendant to plaintiff, and thereafter, in pursuance of the agreement between the parties, judgment was entered in the cause in favor of defendant. Afterwards the defendant put in a switch on the south side of the street, opposite said block 19, and thereupon the plaintiff brought this action, alleging in the first count of his complaint damages by reason of the construction and maintenance of said railroad in front of his lot in block 20, and in the second count, damages to his said lot in block 19, accrued since the former settlement and judgment, by reason of the continuance of said railroad, and the operation thereof, and of the construction of said switch in front of his said lot in block 19.

The defendant denied all the allegations of the complaint other than those of incorporation, pleaded its license from the municipal authorities, and as a separate defense to the second cause of action, pleaded the former settlement, payment, and judgment in bar. At the trial, after the jury was impaneled, but before the introduction of any evidence, defendant moved the court for leave to amend its answer, by pleading the former settlement and judgment as a bar to all the causes of action set out in the complaint. To this the plaintiff objected, on the ground that the amendment did not constitute a defense. After argument, the court overruled the objection, and the amendment was made, the court not imposing terms, to which plaintiff excepted, but plaintiff asked no continuance on account of such amendment. Plaintiff then introduced some evidence tending to show damage to his lot in block 20 by reason of the construction of said railroad, a cut of eighteen inches in depth having been made in the street by reason thereof. Defendant then introduced the judgment roll in the former case, which was admitted without objection, and it was admitted by the parties that the parties to that action were the same as to this; that the railroad mentioned in the former complaint was one and the same railroad as that mentioned in this case; that plaintiff at the time owned the same lots as now, and was then the owner of the same cause of action upon which he now claimed under his first count of the present complaint; and that the said two lots were separated by a distance of 260 feet. Plaintiff then proposed to introduce further evidence as to his damage to the lot situate in block 20,

— the cause of action mentioned in the first count of his complaint, — but the court ruled the same out, on the ground that his claim for such damages was barred by the said former judgment. Plaintiff admitted that he had no claim for damage to his lot in block 19, caused by the construction of the railroad's main track.

The record fails to show the introduction or offer of any evidence of damage by reason of the construction and maintenance of the switch. The plaintiff asked the court to instruct the jury that the former settlement and judgment were not a bar to any claim for damages done to the lot in block 20; that such damages, if any, constituted a separate cause of action from that sued for in the former case, and if any such were found, the same should be included in a verdict for plaintiff. The court refused to so instruct the jury, and, on the contrary, instructed the jury that, as the case was presented, the only question for their consideration was the damages, if any, done to the lot in block 19 by reason of the construction and operation of the switch and side-track in front of his premises in that block. To all these rulings the plaintiff excepted.

We think there was no error in the rulings or instructions of the court in this behalf, so far as relates to any damage accruing to either of plaintiff's lots prior to and up to the time of filing his complaint or making his settlement in the former action. The elements of his damage up to that time may have been multifarious, but the cause of it was a unit,— the construction and operation of a single railroad which was complete at the time. The fact that it damaged two lots belonging to the same man, at the same time and by the same means, no more created two causes of action than if two horses belonging to the same man had been killed by a single collision with a locomotive, and this has been held to constitute but a single cause of action: *Brannenburg v. Indianapolis etc. R. R. Co.*, 13 Ind. 103; 74 Am. Dec. 250. In cases of tort, the question as to the number of causes of action which the same person may have turns upon the number of the torts, not upon the number of different pieces of property which may have been injured. Each separate tort gives a separate cause of action, and but a single one: 1 Sutherland on Damages, 183, and cases cited. Whenever by one act a permanent injury is done, the damages are assessed once for all: 3 Sutherland on Damages, 372. This principle is established in *Marble v. Keyes*, 9 Gray, 221, and in very many other cases. There is

nothing in the authorities cited by appellant in conflict with this view.

Appellant claims that he was entitled to recover for the damages sustained by the continued operation of the railroad after the settlement and judgment in the former case. This claim conflicts with the authorities already cited, but under *Hopkins v. Western Pac. R. R. Co.*, 50 Cal. 190, and *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290, there might be some force in the argument, if there was anything in the case upon which to base it. But the record shows that plaintiff admitted that he had no claim for damages to the lot in block 19, accruing after the date of the former complaint, and it fails to show any proof of damages to either lot after that date.

Appellant also claims that he was entitled to recover for the damages to his lot in block 19 by reason of the construction and operation of the switch and side-track. The court ruled in his favor in that regard, and he proved the fact of the construction and operation of the switch and side-track, but his record fails to show that he offered to prove any damages by reason thereof. We cannot therefore disturb the verdict of the jury in that regard.

Appellant also complains of the action of the court in permitting the answer to be amended after the jury was impaneled, and in denying his subsequent motion to strike out the amendment. This was a matter entirely in the discretion of the court. The plaintiff does not seem to have been taken by surprise, or to have suffered any injury therefrom, and we do not perceive that there was any abuse of discretion.

Judgment and order affirmed.

WORKS, J. (concurring). I concur in the judgment. Under the circumstances of this case, the lots claimed to have been affected lying near to, if not adjoining, each other, and the road being completed at the time the first action was brought, the settlement of that case was rightly held to be a bar to the second action. But a case might arise where a road being constructed would pass over and affect two tracts of land owned by the same person, the tracts being a long distance apart, and that part of the road affecting one piece of land be constructed long before the part affecting the other piece. In such a case, the construction of the whole road could not with any propriety be treated as but one act, and

the land-owner be compelled to delay his action until the whole road is completed, and join his action for damages to both pieces of land, or bring his action for both, when it may be uncertain whether the last part of the road will ever be completed or not. Under such circumstances, separate actions should be allowed, and, in my judgment, the opinion of Mr. Justice Fox is too broad in its language in this respect.

JUDGMENTS—MERGER OF ORIGINAL CAUSE OF ACTION.—A recovery of part of an entire demand merges the whole, and bars any further recovery thereof: *Oliver v. Holt*, 11 Ala. 574; 46 Am. Dec. 228; for an entire demand cannot be split up so as to authorize the bringing of several suits thereon: *Bendernagle v. Cocks*, 19 Wend. 207; 82 Am. Dec. 448, and note 454, 455.

DALY v. PENNIE.

[86 CALIFORNIA, 552.]

JUDGMENTS.—RELIEF FROM AN ERRONEOUS ORDER OF A COURT DISTRIBUTING AN ESTATE of a decedent must be sought by an appeal, and cannot be obtained by a bill in equity, to restrain compliance therewith.

JUDGMENTS.—RELIEF FROM A JUDGMENT WILL NOT BE GRANTED IN EQUITY on the ground that the attorneys or their clerk inadvertently omitted to file an undertaking on appeal therefrom, for which omission such appeal was dismissed, and all remedy thereby lost.

JUDGMENTS.—RELIEF FROM A DECREE DISTRIBUTING THE ESTATE of a decedent will not be granted in equity on the ground that the persons interested did not receive any personal notice of the proceedings, if the statute did not require such notice and there is no allegation that such notice as it did require was not given.

Henry E. Wills and John F. Burris, for the appellants.

A. H. Loughborough, for the respondents.

HAYNE, C. The defendants had final judgment upon demurrer to the second amended complaint, and the plaintiffs appeal. The material facts shown by the pleading are as follows:—

Anna J. Skerrett died in London, England, being a resident of said place at the time of her death, and leaving a will. This will was proved in an English court, and an administrator with the will annexed appointed there. A duly authenticated copy was filed in the probate court of San Francisco, and the defendant Pennie was appointed administrator with the will annexed here. In due course, the San Francisco

court made a decree of settlement of the final account of its administrator, and of final distribution of the property remaining in his hands. This decree recited, among other things, that there were unpaid creditors in England, whose claims had not been presented here; that the estate in England was not sufficient to pay such claims, and that all the legatees and devisees resided in England, except one, whose legacy had lapsed, and another, who had received his share, and contained a provision that the sum remaining in the hands of the administrator here should be delivered to the administrator in England: See Code Civ. Proc., sec. 1667. The plaintiffs are the successors in interest of certain heirs at law, and the suit is for an injunction to restrain the defendants from obeying the decree of distribution, and for a review thereof, and for a decree of distribution in accordance with the plaintiffs' views of what is proper under the circumstances.

The main ground upon which relief is sought is, that the decree of distribution is erroneous both as to the law and as to the facts; that the bequests were void under the law of this state and of England; and that, upon a proper construction of the will, the persons to whose interests the plaintiffs succeeded would be entitled to portions of the estate.

But an appeal from the decree is provided by the statute (Code Civ. Proc., sec. 963), and on such appeal the whole decree can be reviewed. If it be erroneous, either as to the law or the facts, the remedy is by appeal. Mere error is not a ground for relief in equity.

It is alleged, however, that an appeal was taken, but that "the clerk having charge of such matters in the office of the plaintiffs' attorneys inadvertently omitted to file an undertaking on appeal within the time required by law, and said appeal was for that reason dismissed by the supreme court without hearing the merits thereof." This is not a ground for relief in equity: *Barnett v. Kilbourne*, 3 Cal. 327.

"It is further alleged that the plaintiffs' assignors "received no notice of said proceeding, and did not appear therein." But the statute does not require that personal notice should be given: Code Civ. Proc., secs. 1633, 1634. And it is not alleged that the notice which is required was not given: *In re Griffith*, 84 Cal. 109.

The other matters do not require special notice.

We therefore advise that the judgment be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

Hearing in Bank denied.

EQUITY. — As to the power of equity to correct or set aside settlements of accounts or decrees of distribution, see extended note to *Green v. Oughton*, 48 Am. Dec. 744-751.

[IN BANK.]

CUTTING PACKING COMPANY v. PACKERS' EXCHANGE
OF CALIFORNIA.

[38 CALIFORNIA, 374.]

CONTRACT, ASSIGNABILITY OF. — A CONTRACT WHEREBY ONE PERSON AGREES TO BUY AND ANOTHER TO SELL a crop of apricots which the former shall raise during certain specified years, though not negotiable, is transferable, under the Civil Code of California, by indorsement. The indorsement and transfer by a purchaser cannot compel the vendor to accept the transferee nor to release the original purchaser, but the purchaser on accepting the fruit from the vendor may require the assignee in turn to accept it from him and to pay him the contract price therefor.

SALE — POTENTIAL EXISTENCE. — Where a contract of sale and purchase relates to the fruit which shall grow on a seller's trees during the five years succeeding that in which the contract is made, such fruit must be regarded as having a potential existence sufficient to support the contract of sale.

ASSIGNEE'S LIABILITY. — If a contract for the purchase of property is assigned by the vendee, but the vendor refuses to accept the assignee as his debtor or to release the original vendee, the assignment nevertheless transfers to the assignee the duty to receive the property from his assignor, and to make payment therefor according to the terms of the original contract of sale, and failing to do so, he is answerable in damages to his assignor, who must be regarded as being his surety and as having received and paid for the property in that capacity.

A. N. Drown, for the appellant.

Olney, Chickering, and Thomas, for the respondent.

WORKS, J. This appeal is brought here on the judgment roll, which includes a bill of exceptions, from a judgment rendered in favor of plaintiff in an action for damages for breach of contract tried before the court without a jury.

In September, 1881, the plaintiff and one William C. Blackwood made the following contract of purchase and sale: —

"SAN FRANCISCO, September, 17, 1881.

"Bought of W. C. Blackwood his crop of apricots at Haywards, for the seasons of 1882, 1883, 1884, 1885, and 1886, not less than seventy-five tons and not exceeding two hundred tons per annum, at three cents per pound f. o. b. Haywards.

"CUTTING PACKING COMPANY,

"By A. D. CUTTER."

"SAN FRANCISCO, September 17, 1881.

"Sold Cutting Packing Company my crop of apricots at Haywards, for the seasons of 1882, 1883, 1884, 1885, and 1886, not less than seventy-five tons and not exceeding two hundred tons per annum, at three cents per pound f. o. b. Haywards.

"WM. C. BLACKWOOD."

Plaintiff assigned its interest in the contract to the defendant about March 15, 1882, but Blackwood refused to accept the defendant in place of plaintiff.

Blackwood, between July 10 and August 15, 1884, in performance of the contract upon his part, delivered to plaintiff, in different lots, 235,693 pounds of apricots, which the plaintiff, from time to time as they were delivered to it, tendered to the defendant, which refused to accept or pay for each or any lot so tendered.

Plaintiff, as each lot was refused, placed it on sale in open market, and realized from the whole, after the cost of freight and seller's commissions were deducted, the net sum of \$4,770.50. This sum was \$2,300.29 less than the amount it was compelled to pay Blackwood.

The two papers above set forth were construed in *Blackwood v. Cutting Packing Company*, 76 Cal. 212, 9 Am. St. Rep. 199, to be a contract of purchase and sale. It was a non-negotiable contract in character, but under section 1459 of the Civil Code, it could be transferred by indorsement, the same as a negotiable instrument. "Such indorsement," the same section further provides, "shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement."

But the burden of the obligation that rested upon the plaintiff—that is to say, to pay to Blackwood three cents per pound for any quantity of apricots between seventy-five tons and two hundred tons, for the seasons specified in the contract—could not be transferred without the consent of Blackwood: Civ. Code, sec. 1457. And as he refused to consent to

a novation by accepting the defendant in place of plaintiff, so as to release the latter, which he might have done (Civ. Code, sec. 1531, subd. 2), the relations of himself and the plaintiff as to such burden were not affected by the assignment of the contract.

Section 1457 is only intended to protect the party to be benefited from the effects of the assignment of an obligation. So far as the parties to this suit are concerned, the appellant contracted with the respondent to accept and pay for the fruit Blackwood had contracted to deliver to the latter. It could make no difference, therefore, whether the fruit was delivered to the appellant by Blackwood directly, or by the respondent. As between the parties to this suit, the appellant was bound to receive and accept the fruit, and it cannot relieve itself from this obligation by showing that Blackwood had refused to relieve the respondent from its obligation to him.

As the fruit contracted to be sold was to be the product of trees presumably owned by Blackwood at the time the contract was made, it must be considered as having had a potential existence at that time, and was therefore subject to sale. *Argues v. Wasson*, 51 Cal. 620. This being so, although the contract was construed in *Blackwood v. Cutting Packing Company*, 76 Cal. 212, 9 Am. St. Rep. 199, as not having passed the legal title to the fruit before the same was delivered, the plaintiff here at least acquired the right to purchase the fruit, and the assignment of the contract transferred such right to the defendant, whereby it became alone entitled to purchase the fruit for each of the seasons that occurred subsequent to the assignment: *Myers v. South Feather Water Co.*, 10 Cal. 579.

Now, while the plaintiff was not released, as we have seen, from the burden of the contract by the assignment of it, yet when the defendant took the right to purchase the fruit, which was the benefit of the contract, it also assumed the burden of paying for the fruit, in accordance with the following principle of section 1589 of the Civil Code: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

The obligation thus assumed was apparent on the face of the contract. We therefore think it plain that, as the plaintiff, as assignor, was still bound to Blackwood to pay the price stipulated in the contract, notwithstanding the assignment, and as the defendant, as assignee, assumed such obligation,

the plaintiff, as between it and the defendant, stood in the nature of a surety for the latter for the performance of the obligation. If this be correct, it then follows that, from the assignment, an implied contract arose between the plaintiff and defendant, whereby the latter became bound to the former to receive and pay for the apricots according to the terms of the original contract.

This is, we think, the proper construction of section 1457 of the Civil Code, under which the assignment of the non-negotiable contract in question was made. Although the liability of an assignee to his assignor under that section has never been determined by this court, still we are fortified in our conclusion by the analogous doctrine prevailing in the state of Ohio, where a similar liability arises upon the transfer of shares of the capital stock of a corporation. There, as in this state, the transferrer of shares by constitutional and statutory provisions continues liable to the creditors of the corporation who became such while the transferrer held the shares. And in the recent case of *Harpold v. Stobart*, 46 Ohio St. 897, 15 Am. St. Rep. 618, the supreme court of the state stated the doctrine under such provisions thus: "In construing these provisions, the holdings in this state are to the effect that the individual liability of stockholders attaches in favor of creditors at the time the debt is contracted or the liability incurred by the corporation, and that such liability is not discharged by the subsequent assignment or transfer of the stock, but the successive assignees impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock." See also 2 Morawetz on Private Corporations, secs. 879, 888.

This doctrine, it seems to us, is just and reasonable, because, if the transferee should be insolvent, the creditors of the corporation whose claims attached while the transferrer held the shares would not be affected by the transfer; while, on the other hand, if the transferrer, after the transfer, pays his proportion of any indebtedness of the corporation that he was liable for, such payment certainly adds that much to the value of the stock he transferred, and the transferee should reimburse him for the outlay. This last consideration would not apply in Ohio with the same force as in this state; for it appears in *Harpold v. Stobart*, 46 Ohio St. 897, 15 Am. St. Rep. 618, that the liability of stockholders "is not a primary fund or resource for the payment of the debts of the company, but

is collateral to the principal obligation which rests on the corporation, and is to be resorted to only in case of the insolvency of the corporation, or where payment can not be enforced by ordinary process." But in this state such liability is a primary fund or resource to which creditors of a corporation may resort, regardless of the solvency of the corporation: *Morrow v. Superior Court*, 64 Cal. 383; *Mitchell v. Beckman*, 64 Cal. 117.

It is clear that a breach of the implied contract thus created between the parties here was made when the defendant refused to accept and pay for the crop of 1884; and the plaintiff, upon the breach being so made, having stepped in and received and paid for the crop pursuant to the original contract, as it was obliged to do, thereby acquired the right to recover, as damages, from the defendant, the difference between the price paid under the contract to Blackwood, and that realized from the sale of the fruit in open market at current rates.

As the solution of this question is decisive of this appeal, we do not deem it necessary to discuss the other points made by the appellant, but will add that we discover no error in the record.

Judgment affirmed.

CONTRACT, ASSIGNABILITY OF. — A contract by which the owner of a vineyard is given the privilege of selling all the grapes he may grow for a period of ten years, from vines in a certain vineyard, may be assigned by the vineyardist: *La Rue v. Grotzinger*, 84 Cal. 281, 18 Am. St. Rep. 179, in which case are construed sections 1457 and 1459 of the Civil Code of California.

PERKINS v. WAKEHAM.

[86 CALIFORNIA, 580.]

JURISDICTION — DECREE DETERMINING CONFLICTING CLAIMS OF TITLE. —

DECREE AGAINST NON-RESIDENT DEFENDANT, based upon service of process by publication, in an action to determine conflicting claims to real property situated within this state, is valid. The state has power to provide for the determination of such claims, and to authorize the service of process on non-resident defendants by the publication thereof.

DECREE QUIETING TITLE, while not strictly *in rem*, partake of the nature of judgments *in rem*, and may, therefore, be supported by the service of process on a non-resident defendant by publication.

JURISDICTION. — **SERVICE OF SUMMONS ON NON-RESIDENT DEFENDANTS** in an action to determine conflicting claims of title to real estate is as effectively authorized by a general statute applicable to all classes of actions as by a statute relating only to actions of the class in question.

Wells, Guthrie, and Lee, for the appellant.

Victor Montgomery and J. W. Towner, for the respondents.

PATERSON, J. The appeal from the order denying the motion for a new trial, so far as it affects the respondent town of Santa Ana, must be dismissed.

The notice of intention to move for a new trial was not served on said respondent. There was an attempt to serve the statement, but the attorney upon whom it was served had no authority to accept service, which fact was known to appellant at the time of service.

The motion of respondent the town of Santa Ana to dismiss the appeal from the order denying a new trial is granted, and said appeal, in so far as it affects said respondent, is dismissed. A motion was made on various grounds, also, to dismiss the appeal from the judgment, but as the findings support the judgment, and no error appears on the face of the roll, we deem it best not to pass on the motion to dismiss, but to affirm the judgment.

The court found that in a former action brought by Wakeham against Perkins and others, to determine all adverse claims to the property described in the complaint herein, judgment was entered in favor of said Wakeham, defendant herein, adjudging him to be the owner of the property.

It is claimed by appellant that the decree in the former action to quiet title is *in personam*, and not *in rem*, and that as the service of summons was by publication, while he was absent from the state, and as he did not answer or appear, the judgment is void.

If it be true that a state has no power by statute to provide for the determination of adverse claims to real estate lying within its limits, as against non-resident claimants, who can be brought into court only by publication,—if the state in her sovereignty is impotent to protect the title of citizens to her soil against the asserted claims of non-residents who will not voluntarily submit their claims to her courts for adjudication,—great evil must result. Certainty and security in the titles of real estate, and convenient and effective procedure for the determination of individual rights in such property, are essential to the prosperity of the community. If those who cannot be reached by the process of the courts may assert adverse claims to real estate, and hold unlawful clouds over the title of the owner, every homestead and lot in the state may have a cloud cast upon it for all time.

We do not think that a sovereign state is so limited in its power. The state is paramount in power over all things real

within its territorial boundaries, except so far as its authority is limited by the constitution and laws of the United States; and the courts of the state, acting within that limitation, have, and may, exercise all the jurisdiction over all persons and things which the constitution and laws of the state confer upon them. The manner of obtaining such jurisdiction, and the procedure for its exercise, are matters of state legislation.

The legislature of this state has provided that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim": Code Civ. Proc., sec. 738. It has also provided: "Where the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the state, and the fact appears by affidavit, to the satisfaction of the court, or a judge thereof, and it also appears, by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months": Code Civ. Proc., secs. 412, 413.

Unless the method of giving notice above prescribed is unreasonable, or is in conflict with some provision of the constitution or principle of natural justice, it cannot be held invalid. In determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger: *United States v. Fox*, 94 U. S. 815. While a decree quieting title is not *in rem*, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment *in rem*.

But it is not necessary, in support of a judgment in such an action, where service has been had by publication, to determine the question whether it is a judgment *in personam* or one *in rem*. This precise point has recently been decided by the supreme court of the United States. Mr. Justice Brewer, speaking for the court, said: "The question is, not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estates within its limits? and what jurisdiction may it give, by statute, to its own courts to determine the validity and extent of the claims of non-residents to such real estate?": *Arndt v. Griggs*, 184 U. S. 820. There the power of the state to quiet title as against non-residents, by constructive service, is upheld, and the cases upon which appellant herein chiefly relies are fully considered and elaborately reviewed.

In that case, it is true, the statute of the state of Nebraska, which was under consideration, expressly provided for service by publication "in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or foreign corporation"; but the authority conferred by the legislature of this state, in section 412 of the Code of Civil Procedure, is as great as that given by the Nebraska statute. While our statute is general, and in terms applies to all actions, it is not invalid because it includes in its provisions proceedings purely *in personam*.

If the judgment in the action of Wakeham is valid and binding,—and we hold that it is,—other questions raised by appellant need not be noticed.

The judgment and order are affirmed.

ACTION TO QUIET TITLE — SERVICE BY PUBLICATION. — A decree to quiet title to realty and remove clouds from the same may be rendered upon service of summons by publication upon the defendant: *Essig v. Lower*, 120 Ind. 239; *Bancroft v. Conant*, 64 N. H. 151; *Dillon v. Heller*, 39 Kan. 599; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742, and note 762-770. Compare *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74.

With respect to the jurisdiction of courts over property within the state, acquired by service of process by publication, see *Young v. Upshur*, 42 La. Ann. 362; *post*, p. 000, and note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

HUNTLEY v. HOLT.

[59 CONNECTICUT, 102.]

JUDGMENTS — RES JUDICATA. — The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the things expressly stated and determined, whether or not they were expressly litigated and considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purposes of the estoppel, deemed to have been actually decided.

JUDGMENTS — RES JUDICATA. — The only matter essential to making a former judgment on the merits conclusive between the parties is, that the question to be determined in the second action is the same question judicially settled in the first. A judgment is conclusive not only as to the subject-matter in the suit, but as to all other suits which, though concerning other subject-matter, involve the same question in controversy. Accordingly, the record of a finding of indebtedness in favor of a party to one suit is admissible and conclusive in a subsequent suit brought by his assignee to recover the same debt from the same judgment debtor.

PRACTICE — IGNORANCE OF CAUSE OF ABATEMENT will never justify the filing of a plea in abatement after the time limited has expired.

W. B. Stoddard, and S. C. Loomis, for the appellant.

J. W. Alling, for the appellee.

ANDREWS, C. J. The appeal in this case presents two questions; one in respect to a plea in abatement, the other in respect to the admission of evidence. The complaint was returnable, and was returned to the superior court in New Haven County on the first Tuesday of March, 1888, at which time the parties respectively appeared. On the third day of March, 1890, and after the case had been regularly assigned

for trial, the defendant filed with the clerk, but without leave of the court, a plea in abatement for causes which in fact existed at the time the suit was brought, but of which the defendant was ignorant until that day. At the opening of the trial, the plaintiff moved the court that the plea in abatement be stricken from the files of the case. The court allowed the motion. This is alleged as error.

The first section of rule 19 of the general rules of practice (Practice Act, p. 261) is, that "all pleas in abatement in the superior court must be filed on or before the opening of the court on the day following the return day of the writ." The rule was intended to be exclusive. Ignorance of a cause of abatement will never justify the filing a plea after the time limited: *James v. Morgan*, 36 Conn. 348.

On the trial of the case, for the purpose of proving the indebtedness claimed in the complaint and specifically mentioned in the bill of particulars, the plaintiff offered in evidence the record of a case entitled *Huntley v. Holt*, tried in the superior court for New Haven County at its October session, 1839. To the admission of this record the defendant objected, but the court admitted it. This is the other alleged error.

The case of *Huntley v. Holt* was a complaint brought by Huntley, the present plaintiff, alleging precisely the same indebtedness that is alleged in the present complaint, and praying for the foreclosure of a builder's lien upon certain lands to secure the payment thereof. It made Alfred Holt, the present defendant, and Mary Holt, his wife, defendants, and averred that they were both liable for the debt, and that while Mary Holt was the owner upon the record of the lands sought to be foreclosed, yet that Alfred Holt had an interest therein which might be foreclosed also. After that case had been pending in court for some time, Halstead, Harmount, & Co., a copartnership consisting of Andrew C. Halstead, A. J. Harmount, George P. Dunham, and Merrill Loomis, all of New Haven, were, upon motion of the defendants, made parties plaintiff thereto. It appeared that this copartnership was the assignee of nearly the whole of the indebtedness named in that complaint, as security for a larger sum due them from Huntley, and upon which Huntley still continued liable to them. In that action Alfred Holt made a separate defense, denying that he was indebted to the plaintiffs therein, either alone or jointly with his wife. Issue was joined on that defense,

it was fully tried, and the court found that he was indebted on account of the Dixwell Avenue house the sum of \$907.39, and on account of the Gibbs Street house the sum of \$939.56; and such finding was made a part of the judgment file. On other issues made in that case, it was found that Mary Holt was not liable in any way for the indebtedness, and it was also found that Alfred Holt had no interest in the land on which the houses were built that could be foreclosed. The complaint was thereupon dismissed. Upon the present trial, on evidence *dehors* the record, the court found that on the trial of the former case the question of the performance by the plaintiff of the contract was the matter on which most of the evidence on that trial was taken, and that it was argued by counsel on both sides.

We think there was no error in admitting that record. "The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the things expressly stated and decided, whether they were or were not expressly litigated or considered. It is not necessary to the conclusiveness of a former judgment that issues should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided": *Pray v. Hegeman*, 98 N. Y. 358. See also *Campbell Printing Press Co. v. Walker*, 114 N. Y. 7. "The only matter essential to making a former judgment on the merits conclusive between the parties is, that the question to be determined in the second action is the same question judicially settled in the first. A judgment is conclusive not only as to the subject-matter in the suit, but as to all other suits which, though concerning other subject-matters, involve the same question of controversy": *Freeman on judgments*, sec. 253. See also *Aurora City v. West*, 7 Wall. 82; *Gardner v. Buckbee*, 3 Cow. 120; 15 Am. Dec. 256; *Collins v. Bennett*, 46 N. Y. 490; *Babcock v. Camp*, 12 Ohio St. 11.

It is found that Halstead, Harmount, & Co. are now the assignees of the whole debt owed by Alfred Holt to Huntley; that is, the whole of the debt for which this suit is brought. The suit might have been prosecuted in his name for their benefit: *Saugatuck Bridge Co. v. Town of Westport*, 39 Conn.

337. But whether prosecuted in their own name or in Huntley's name, they are the real parties in interest as plaintiffs. Comparing, then, the present suit with the issue formed in the prior one on the separate defense pleaded by Alfred Holt, it appears that the parties plaintiff are identical in legal right. The defendant is the same, and the subject-matter is the very same that was then tried and decided; so that this case is brought within the strictest definition of an estoppel by a former judgment, — identity of parties and identity of the cause of action: *Supples v. Cannon*, 44 Conn. 424; *Munson v. Munson*, 80 Conn. 433; *Hungerford's Appeal*, 41 Conn. 322.

"It is an established rule in the administration of justice that all controversies between parties, once litigated and fully and impartially determined, shall cease; and to that end no fact involved in such litigated controversy, shown by the record to have been material to its determination and to have been put in issue and decided, whether the proceeding was at law or in equity, shall again be litigated between the same parties": Butler, J., in *Munson v. Munson*, 80 Conn. 433.

There is no error in the judgment appealed from.

RES JUDICATA. — A judgment rendered upon the merits is co-extensive with the issues upon which it is founded, and conclusive between the parties thereto, not only as to matters actually litigated, but as to every other matter directly at issue by the pleadings which the defeated party might have litigated: *Lorillard v. Clyde*, 122 N. Y. 41; 19 Am. St. Rep. 470; note to *Gould v. Sternburg*, 15 Am. St. Rep. 142; *Windett v. Life Ins. Co.*, 130 Ill. 622; *McOullough v. Dashiell*, 85 Va. 37; *Perry v. Mills*, 76 Iowa, 622; *Lamb v. McConkey*, 76 Iowa, 47; *Green v. Sanborn*, 150 Mass. 454; *Thompson v. Lester*, 75 Tex. 521. But a judgment does not operate as an estoppel with respect to matters not determined therein, and which could not have been properly litigated under the issues: *Munson v. Bowen*, 80 Cal. 572; *Ryan v. Martin*, 104 N. C. 176; *Louisville etc. R'y Co. v. Casley*, 119 Ind. 142.

HAUSSMAN v. BURNHAM.

[39 CONNECTICUT, 117.]

HUSBAND AND WIFE — CONVEYANCES BETWEEN. — Husband and wife may, during coverture, make contracts for the conveyances of property between themselves which are valid in equity; and although they will be examined with great care, they will always be upheld when found to contain the essential requisites.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — CONSIDERATION. — A promise by a married woman to reconvey certain property to her husband upon his request, in consideration of his conveyance of the same to her through a third person, and reserving to the husband a life use

therein, is based upon a valuable and adequate consideration, and is enforceable in equity.

HUSBAND AND WIFE — CONVEYANCES BETWEEN. — A contract of a married woman with her husband, for the benefit of herself or her estate, is binding in equity, and the estate affected thereby need not be held by her to her sole and separate use.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — STATUTE OF FRAUDS. —

If a married woman contracts to reconvey certain property to her husband upon his request, in consideration of his conveyance of the same to her through a trustee, the statute of frauds does not apply. Such contract need not be in writing, as part of it has been fully performed by one of the contracting parties, nor is it objectionable because not to be performed within a year, when no time for performance is stipulated.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — MISTAKE. — Where a married woman agrees to reconvey property to her husband upon his request, in consideration of a conveyance of the same to her, but the husband fails to join the wife in such reconveyance, owing to the erroneous advice of his counsel, equity will relieve against the legal mistake, and order a reconveyance, unless there are substantial reasons to the contrary.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — WAIVER. — Where a wife agrees to reconvey property to her husband upon his request, in consideration of his conveyance of the same to her, her subsequent consent and attempt to reconvey constitute a waiver of a former request to reconvey, and such waiver attaches to those who claim under or through her.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — DUTY OF HEIRS TO RECONVEY. — Where a wife promises to reconvey property to her husband upon his request, in consideration of his conveyance of the same to her, the liability to reconvey at any time upon request constitutes an equity which attaches to it while in her hands, and her heirs take and hold it subject to the same equity, which can be enforced against them to the same extent that it might have been enforced against her during her lifetime.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — PAROL PROOF OF CONSIDERATION. — Where the real consideration for a conveyance from husband to wife is different from that expressed in the deed, it may be shown by parol, and the variance does not impair the validity or change the effect of the conveyance.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — PROMISE TO RECONVEY.

— Where a wife promises to reconvey certain property to her husband upon his request, in consideration of a conveyance of the same to her, reserving the use of a life estate in the property to him, the promise to reconvey is not inconsistent with the interest in the premises reserved in the deed to her.

HUSBAND AND WIFE — CONVEYANCES BETWEEN, WHETHER VOLUNTARY. —

Where a wife agrees to reconvey property to her husband upon his request, in consideration of his conveyance of the same to her, such reconveyance is not voluntary so as to prevent equity from enforcing it, in the absence of proof of her indebtedness, or that creditors were defrauded or prejudiced.

JURISDICTION — WAIVER OF SERVICE. — A non-resident who voluntarily appears by counsel, and without interposing any objection to the jurisdic-

diction of the court pleads to the merits of the case, thereby waives service of the complaint upon himself.

HUSBAND AND WIFE — CONVEYANCES BETWEEN — ENFORCEMENT OF PROMISE TO RECONVEY. — Where a married woman promises to reconvey property to her husband upon his request, in consideration of his conveyance of the same to her, equity will enforce such promise, although she has made an ineffectual attempt to reconvey.

Suit to correct a deed and to compel the conveyance of certain real estate. Jacob and Mary Haussman were married in the year 1867. Each had been married before, and each had children by a former marriage. On December 11, 1885, Jacob, being in feeble health, and not expecting to outlive his wife, and intending to make provision for her after his death, conveyed the premises in dispute by quitclaim deed to an attorney at law, reserving to himself the use, occupation, and control during his life. As part of the same transaction, and on the same day, his grantee, by release deed, conveyed the land to Mary Haussman. The consideration expressed in each of the deeds was, "divers good causes and considerations, and especially one dollar" received by the grantor. The proof showed that the real consideration for the deeds was a prior promise made by Mary to Jacob that she would reconvey the land to him whenever he should request her to do so. In July, 1888, Jacob requested her to reconvey the land to him, and on the 26th of that month she attempted to comply with his request, and made a release deed of the land, which was properly executed by her. This deed was never jointly executed by herself and her husband, and was never executed by her husband at all. Mary died soon thereafter, and neither she nor her husband, at any time during her life, knew that it was necessary that her deed of release, which was made to an attorney, who in turn conveyed to Jacob, should have been executed jointly by herself and her husband. This mistake arose through relying upon the erroneous advice of an attorney, who told them that the deed so executed by her would convey her interest to her husband. Since this suit was instituted, Jacob Haussman has died intestate. The controversy is therefore between his heirs as plaintiffs and the children of Mary Haussman by a former marriage as defendants. There was no issue of the marriage between Jacob and Mary Haussman. The case was reserved for the judgment of this court.

W. F. Henney, for the plaintiffs.

R. Welles and E. Johnson, for the defendants.

PHELPS, J. The plaintiff claimed in his complaint,—
1. Pecuniary damages; 2. A reformation of the deed from Mrs. Haussman to the attorney, so as to join Mr. Haussman as grantor with his wife; 3. The removal of the cloud on the plaintiff's title by commanding the defendants to convey to Mr. Haussman any title or interest in the premises which they may have; and 4. Such other and further relief as to equity may appertain. The question is, whether by this action there is a remedy for those who, by the aforesaid mistake, have been deprived of an estate which was by both parties intended for them, and which but for such mistake they would have received.

It is scarcely possible that the case could be made which would present clearer or stronger equities, and it would seem that the consequences of such a mistake should be relieved against, unless there are insurmountable obstacles in the way; and a court of equity should be astute and diligent in its efforts to prevent such manifest injustice.

The underlying question in the case is, whether the promise by Mrs. Haussman to reconvey the property was valid. That the legal and equitable title, subject to the reserved life estate in Mr. Haussman, was vested in her, is conceded. Indeed, the defendants claim and derive whatever title or interest they possess in the property through the deed from Mr. Haussman to his wife, which was made pursuant to the agreement between them, a part of which was the promise of Mrs. Haussman to reconvey.

That husband and wife may, during coverture, make contracts for the conveyance of property between themselves which will be good in equity has long been settled, both in Great Britain and here. The court will examine them with great care, and when they are found to contain the essential requisites which exist in the case before us, they will always be upheld: *Slanning v. Style*, 8 P. Wms. 334; *Lucas v. Lucas*, 1 Atk. 270; *Lady Arundell v. Phipps*, 10 Ves. 146; *Livingston v. Livingston*, 2 Johns. Ch. 587; *Shepard v. Shepard*, 7 Johns. Ch. 57; 11 Am. Dec. 396; *Wallingsford v. Allen*, 10 Pet. 594; *Hinman v. Parkie*, 33 Conn. 197, 198.

The consideration for the promise of Mrs. Haussman was the conveyance to her, and the provision for her support secured by it. That it was valuable and adequate cannot be questioned, nor that it was made for the benefit of herself and her estate. It was reasonable and certain in its terms, and

would not, if executed, interfere with the rights of creditors, and she might well have made the reconveyance in pursuance of it. If it was void at law, its validity in equity cannot now be doubted: *Donovan's Appeal*, 41 Conn. 551; *Hitchcock v. Kiely*, 41 Conn. 611.

It is said the property was not her sole and separate estate, and therefore her promise to reconvey was invalid. This objection has been practically disposed of in what is said respecting the validity of the promise. As the promise by which she obtained the conveyance was for the benefit of herself and her estate, it is unimportant whether the property to which it related was her sole and separate estate. The contract of a married woman for the benefit of herself or her estate is binding in equity, and the estate affected by it need not be held by her to her sole and separate use: See authorities last above cited.

The statute of frauds is also interposed as a defense. If this was a contract relating to the sale of land, and therefore originally within the statute, it was part of an agreement which had been fully performed by the other contracting party to it, and therefore taken from its operation. It is not objectionable for the reason that the promise was not to be performed within a year. No time for performance was stipulated, and it might have been made at any time. That statute has no application to this case: *Hayden v. Denslow*, 27 Conn. 341; 1 Rev. Swift's Dig. 255, and cases cited.

It is claimed that the mistake was one of law, and not of fact, and that therefore a court of equity can give no relief. This has been considered the general rule on the subject; but in *Stedwell v. Anderson*, 21 Conn. 144, the court say that it is not of universal or unqualified application. And in *Patterson v. Bloomer*, 35 Conn. 64, 95 Am. Dec. 218, a case where the parties were mistaken as to the legal effect of a chattel mortgage under which possession was not retained by the vendee, and where a specific performance of the contract was asked, Butler, J., giving the opinion of the court, says: "The parties were mistaken. Such a mortgage would be worthless, unless possession was retained by the vendee. It is too clear for doubt that the respondent never would have entered into that agreement but for the mistaken supposition that in the execution of it he was to have the protection of a valid mortgage. It is equally clear that such a mistake is a most material one, and that it was the right and duty of the re-

spondent to refuse to execute the agreement on discovering it, and it would be grossly inequitable and unjust to compel him to perform it."

The analogy between that case and this is very striking, and the principle which the court there applied seems directly applicable to the facts here.

It is said that the complaint alleges no request to reconvey; that such a request was a condition precedent to the plaintiff's right to a reconveyance; that it should have been alleged, and because it was not, no evidence to prove it was admissible; and that to the admission of such evidence objection was duly made.

Ordinarily, such an allegation would be necessary; but it appears that Mrs. Haussman was willing, and attempted to make, and supposed she had made, a proper conveyance. If no request was made, there was such an attempted performance by her, by acts which, in their order, were subsequent to a request that she must be held to have waived it, and the waiver will have the same operation and effect against those who stand in her place as against herself. The defendants are claiming the property by inheritance from her, and under no other title. The promise to reconvey was made by her, and she held the property subject to a request at any time to make the reconveyance. That liability and duty constituted an equity which attached to it in her hands, and the defendants took and now hold it subject to the same equity, which can be enforced against them in the same manner and to the same extent that it might have been against her if she were living.

That a request to reconvey was in fact made by Mr. Haussman is found by the court, but under the circumstances we consider it entirely immaterial.

It is further said that the husband did not offer to join with his wife in a reconveyance. This is true, and in his non-joinder consists the mistake sought to be relieved against. He was willing to join, and would have done so, but for the erroneous legal advice by his attorney, in whom he confided, and on whose judgment he was justified in relying. If the non-joinder and the mistake which occasioned it can be remedied, we think the omission of the offer to join too technical and unimportant to be allowed to prevent the court from doing equity when it is clearly demanded, and should be done unless there are substantial reasons to the contrary.

It is also urged that the agreement between the parties contradicts, or is inconsistent with, the deed from Mr. Haussman, because it is alleged in the complaint that the consideration was the promise of Mrs. Haussman to reconvey, whereas in the deed it was stated to be of a pecuniary character.

It has been often decided by this court, and is as well settled by its repeated adjudications as any question can be, that when the real consideration for a conveyance is different from that expressed in the deed, it may be shown by parol, and the variance does not impair the validity or change the effect of the conveyance.

The contract, which was the consideration for the deed, was not intended to be reduced to writing or incorporated in the deed, and the deed was only given in pursuance and part execution of the contract: *Crocker v. Higgins*, 7 Conn. 342; *Collins v. Tillou*, 26 Conn. 368; 68 Am. Dec. 398; *Galpin v. Atwater*, 29 Conn. 99; *Clarke v. Tappin*, 32 Conn. 67, 68; *Purcell v. Burns*, 39 Conn. 429; *Post v. Gilbert*, 44 Conn. 10; *Schindler v. Muhlheiser*, 45 Conn. 154; *Hubbard v. Ensign*, 46 Conn. 585; *McFarland v. Sikes*, 54 Conn. 252; 1 Am. St. Rep. 111.

It is said also that the agreement to reconvey is inconsistent with the life estate reserved in the deed. The promise of Mrs. Haussman to reconvey the estate was simply an agreement to reconvey what had been previously conveyed to her. She could have done nothing more, and it is obvious that nothing else was contemplated or promised, or understood by the parties to be promised.

It is also said that it is inconsistent with the use and behoof, and the covenant of non-claim, contained in the deed. These are objections of a similar character with the last, and like that, rest on no substantial foundation. The use and behoof of the grantee, and the non-claim by the grantor, relate only to the quantity and character of the estate conveyed, and have no connection with or reference to any interest in the premises which was reserved.

The further claim is made that the deed from Mrs. Haussman was a voluntary conveyance, and for that reason a court of equity will not relieve. There was a good and valuable consideration for the deed in the title to and use of the property she received from Mr. Haussman under the agreement. She does not appear to have been indebted, no creditors were defrauded or prejudiced, and the claim that it was voluntary is wholly unsupported.

It is also insisted that no judgment can be rendered against the defendant Erwin Larens, because he is a non-resident of the state, and no service of the complaint was made on him.

He appeared by counsel, and without interposing any objection to the jurisdiction of the court, pleaded to the merits of the case. He waived service by voluntarily submitting to the jurisdiction, and as the property involved in this issue is situated in this state, and within the jurisdiction of its courts, there is no reason for this claim: *Payne v. Farmers' and Citizens' Bank*, 29 Conn. 415.

It is claimed further that the deed by Mrs. Haussman was void, and that a court of equity has no power to give it vitality and force. This may be so, but the court may look through the deed to the contract back of it, and enforce that, provided it is valid: *Goodman v. Randall*, 44 Conn. 321.

Some remarks in the opinion of the court, in the case of *Dickinson v. Glenney*, 27 Conn. 104, on which the defendants rely, at first sight appear to be at variance with that doctrine. The court was dealing in that case with a deed which was purely voluntary, and wholly without consideration, and which failed of having been properly executed by the mere ignorance of the parties with respect to the necessary legal formalities, and which had no valid contract behind it which could have been enforced. The parties had not the excuse of having been misled by the mistaken judgment of a legal adviser in whom they properly trusted, and the accident or mistake consisted wholly in their ignorance of the law, which they took no pains to prevent.

Toward the close of the opinion, the court, by Storrs, C. J., say, on page 112: "It sometimes happens that where equity is compelled to yield to the absolute requirements of law restraining its efficacy in reforming agreements, some other agreement behind the defective contract may exist of which equity can lay hold, and thus indirectly, though in strict conformity with established principles, afford a remedy for the deficiency. A defective deed is sometimes treated practically as an executory contract for the sale of lands, and its execution is decreed. We confess that it seems to us that this proceeding is not the reformation of a deficient instrument, but rather belongs to the branch of equity jurisprudence which relates to the specific performance of contracts, — to the performance of contracts of which the defective instrument is the evidence or memorandum. In the present case the prin-

ciple will not avail the petitioners. If they resort to an agreement lying back of the deed, they will bring to light only a contract legally void. For it is not to be denied that the executory agreement of a married woman concerning her real estate, though assented to by her husband, is absolutely a nullity, — a proposition which, as we have already stated, is true of all the contracts of married women other than those which the statute expressly validates."

That case was decided prior to the statute of 1872 giving a remedy at law against married women upon contracts made by them for the benefit of themselves or their estates, and before the many judicial decisions and statutory provisions which have since greatly enlarged the capacity of married women with respect to their property and rights, and extended their remedies and liabilities upon their contracts. This has necessarily carried with it a corresponding enlargement of the jurisdiction of courts, both of law and equity, with respect to them and their estates. The reasoning of the opinion was well adapted to the facts of that case and the law as it then existed. But we think we may now well hold, without modifying that opinion except so far as the difference in the facts and the changes in the law necessarily produce that effect, that the defendants are not equitably entitled to retain the estate, and that such relief should be granted as it is competent for a court of equity to give.

In the view we have taken of the case, it seems entirely unimportant whether the deed from Mr. Haussman raised a trust of any kind for the benefit of himself or his heirs; and we discover nothing in the conduct of Mrs. Hausseman, or in the relations of the parties, which we think tends to establish actual or constructive fraud. We think the arm of equity is long enough to reach the injustice we are endeavoring to prevent, and that it can be done without violence to established principles.

As the complaint is framed, however, and as the record now stands, we think there are serious difficulties in the way of advising the superior court to render a judgment for the plaintiff. We do not see how, since the decease of Mr. Haussman, we can properly advise that the deed from Mrs. Haussman to the attorney be reformed so as to join Mr. Haussman as a grantor with his wife, and permit and direct him to execute the same; nor that the alleged cloud be removed from the plaintiff's title by a decree commanding the defendants to con-

vey to Mr. Haussman such title or interest in the property as they may have.

The heirs at law of Mr. Haussman are now the only parties properly entitled to relief. They have not since his death been made parties to the action, and are not regularly before the court or legally asking for relief. It is true that the death of Mr. Haussman has been suggested on the record, and that his administrator has entered to prosecute the action. We do not see how he is entitled in his representative character to relief, or to a judgment for the benefit of the heirs. If it was an action at law to recover the possession of the estate under General Statutes, section 1012, there might be no difficulty; but the statute is in express terms limited to an action of disseisin, and we do not feel justified in extending it by analogy, though the object sought to be obtained in this case is similar to that provided for in the statute.

We think the case should be remanded to the superior court, where the plaintiff can ask liberty to file a supplemental complaint showing the interest of the heirs of Mr. Haussman in the subject-matter, and making them parties, and by such additional averments as may be pertinent and proper, demand for them appropriate relief.

ANDREWS, C. J., dissented from the opinion delivered by the majority of the court, and stated as to the plaintiff's first claim for relief, namely, that the deed from Mary Haussman to the attorney be so reformed as to join Jacob Haussman as a grantor therein, that because of his death after the institution of the suit it was impossible to grant this prayer, but that treating the case as though he was still living, the rule ought to prevail that where a deed or other written instrument is defective in some particular required by statute, it cannot be reformed; citing Story's Eq. Jur., sec. 177; *Bright v. Boyd*, 1 Story, 478; *Hibbert v. Rolleston*, 3 Brown Ch. 571; *Dickinson v. Glasney*, 27 Conn. 104, referred to at length in the foregoing opinion.

Judge Andrews said of the latter case: "That case is conclusive of the present one in respect to the first claim for relief. The reformation of any written contract implies that the agreement between the parties is executed. It is the correction of an executed agreement, and not the performance of an executory one. But if we regard the promise of Mrs. Haussman as an executory one on her part to convey her land, the difficulty is only increased, for the executory contract of a married woman to convey land is wholly void. No court can give effect to such an agreement by decreeing its fulfillment: *Gore v. Carl*, 47 Conn. 291; *Annan v. Merritt*, 13 Conn. 478; *Dickinson v. Glasney*, 27 Conn. 104; *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245; *Purcell v. Goshorn*, 17 Ohio, 105; *Carr v. Williams*, 10 Ohio, 305."

As to the plaintiff's claim to recover because of a trust, Judge Andrews says, in effect, that if it be granted that Mrs. Haussman was able notwithstanding her coverture to make contracts concerning land, still it must be conceded

that the conveyance to her by Hausseman, on her promise to reconvey to him upon his request, apparently created an express trust, and such a trust cannot be proved by parol: *Dean v. Dean*, 6 Conn. 285; *Vail's Appeal*, 37 Conn. 196; *Todd v. Munson*, 53 Conn. 579.

The plaintiffs do not admit that such a trust existed, and disclaim any right to recover because of such a trust. They are estopped by the deeds from claiming a resulting trust, on the ground that they were without actual consideration: *Belden v. Seymour*, 8 Conn. 304; 21 Am. Dec. 681; *Fecney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Graves v. Graves*, 29 N. H. 129; *Philbrook v. Delano*, 29 Me. 412.

The claim is made that before Hausseman requested Mrs. Hausseman to reconvey to him there was no trust, and that after he made such request a trust arose; but it can hardly be said that the request alone made Mrs. Hausseman a trustee. Such request did not change the character of her promise; it only fixed the time when it became her duty to perform it; and according to the claim set up, if Hausseman had never made any request for the reconveyance, or if, upon such request, the land had been revested in him, there never would have been any trust. Still, it is insisted that because the land was not reconveyed to him upon request, Mrs. Hausseman became a trustee for him by construction of law. On this point, the learned chief justice said: "Pomeroy's Equity Jurisprudence, section 153, says: 'All instances of constructive trusts may be referred to what equity denominates fraud, actual or constructive, including acts or omissions in violation of fiduciary obligation.' In another part of the same section, it says that constructive trusts are sometimes called trusts *ex maleficio*. I look in vain through this case for any indication of fraud or want of good faith on the part of Mrs. Hausseman. On the contrary, the facts show that she made the promise to reconvey honestly and with the full intention to perform it. She did perform it so far as performance depended on her. It is well settled that the failure to perform a promise honestly made is not fraud: *Fecney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Perry v. McHenry*, 13 Ill. 227; *Wheeler v. Reynolds*, 66 N. Y. 234; *Levy v. Brush*, 45 N. Y. 589; *Owson v. Wheeler*, 25 Me. 269; 43 Am. Dec. 283; *Burden v. Sheridan*, 36 Iowa, 126; 14 Am. Rep. 505; *Boyd v. Stone*, 11 Mass. 248. No fraud, actual or constructive, towards her husband can be imputed to Mrs. Hausseman, for she did exactly what he asked her to do, and just what she had promised to do, so far as it was possible for her to do it. That the deed failed to have the effect they desired was owing to the mistake of Mr. Hausseman as much as to any mistake of Mrs. Hausseman. It was a mutual mistake, owing to incorrect advice as to the legal effect of that deed. It has been laid down by high authority that where parties have been mutually mistaken as to the legal effect of the transaction into which they have entered, equity will not interfere to reform the contract: *Eaglesfield v. Marquis of Londonderry*, L. R. 4 Ch. Div. 693; Pomeroy's Eq. Jur., sec. 846; *Wheaton v. Wheaton*, 9 Conn. 96. Whether or not this is the law it is not necessary to decide. In the present case, the mistake is as to a statute requisite, which on other grounds cannot be supplied by any equitable interference, as already shown."

HUSBAND AND WIFE — CONVEYANCES BETWEEN. — Deeds of conveyance from a wife to her husband: Extended note to *Turner v. Shaw*, 9 Am. St. Rep. 323-326. Contracts and conveyances between husband and wife: Extended note to *Kantrowitz v. Prather*, 99 Am. Dec. 599 et seq.; *Manchester v. Tibbetts*, 121 N. Y. 219; 18 Am. St. Rep. 816; *Corcoran v. Corcoran*, 119

Ind. 133; 12 Am. St. Rep. 390, and note; *Manning v. Phippen*, 86 Ala. 337; 11 Am. St. Rep. 46, and note. Deeds of separation between husband and wife are valid, when made during the arrangements for separation or thereafter: *Enloe v. Wheeler*, 75 Tex. 390. In Mississippi, all transfers between husband and wife must be in writing, to be valid as against third persons: *Arnold v. Elkins*, 67 Miss. 675.

RICHMOND'S APPEAL.

[20 CORRECTOR, 22.]

WILLS — EVIDENCE TO RAISE PRESUMPTION OF UNDUE INFLUENCE. — On the issue of undue influence in the execution of a will, exercised over the testatrix by a legatee who was her confidential agent, all the facts affecting or attending the relations of the parties, and having a direct, positive, important bearing upon the question, such as the amount, situation, and character of the property with which he was intrusted during any and all portions of his stewardship, as well as the degree of knowledge which the testatrix possessed in regard to the same, and the agent's conduct in imparting information upon the subject to her, or in withholding it from her, are relevant, important, and admissible.

WILLS — OPINION OF MENTAL CAPACITY BY COMPARISON AS EVIDENCE. — On the issue of undue influence, a witness may give his conception of the testatrix's mental capacity by comparison, and state that it is his opinion, founded on observation, that such mental capacity was not greater than that of an average child of seven or eight years at the time that the will was executed.

JURY — RIGHT TO READ FROM LAW BOOK TO. — On the contest of a will, counsel has no right to read to the jury, in his argument, from a standard law work on wills, as the reading to the court or jury of scientific books recognized as standard authority, when necessary to an understanding of any relevant matter, may be granted or denied in the sound discretion of the court.

WILLS — CAPACITY REQUIRED OF A TESTATOR to make his will valid is, that at the time of its execution he be possessed of sufficient intelligence and memory to fairly and rationally comprehend the effect of what he is doing, and the nature and condition of his property, to understand who are or who should be the natural objects of his bounty, and his relations to them, the manner in which he wishes to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will he is making.

WILLS — TESTAMENTARY CAPACITY. — Mere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary capacity, but evidence of such facts, or of any of them, should be submitted to the jury to aid in determining whether or not the testator had sufficient testamentary capacity at the time of executing his will.

WILLS — PRESUMPTION OF UNDUE INFLUENCE. — The mere existence of a confidential relation will not in all cases necessarily raise a presumption of undue influence in the execution of a will, especially when it appears that the opportunity of familiar and secret communication and intercourse between the testator and the beneficiary, at a time proximate to

the execution of the will, is wanting; but when a legacy is given to an attorney, confidential adviser, guardian, or other person sustaining a relation of special confidence to the testator, or when the person who prepares the will or conducts its execution, not being a relative who would, in the absence of the will, be an heir, derives a benefit from its provisions, such presumption may arise from the surrounding circumstances which would justify the jury in finding that undue influence existed, in the absence of rebutting or explanatory proof. The question of undue influence should be left for the jury to determine, under proper instructions.

WILLS—PRESUMPTION OF UNDUE INFLUENCE.—When the person who drafts a will or participates in procuring its provisions from the testator also occupies a relation of special confidence toward him, and would not be a beneficiary in the absence of the will, and is specially benefited by its terms, the presumption of undue influence arises, and the burden of proof is on him to show that the will was executed freely and without his influence. In such case, direct and positive proof that the beneficiary took part in procuring from the testator the terms and provisions of the will is not required to raise such presumption; it may be inferred from surrounding circumstances.

O. H. Briscoe and J. P. Andrews, for the appellants.

O. E. Searls and G. A. Conant, for the appellees.

FENN, J. On the trial of this appeal to the jury, the appellees, having offered the will and codicil, and having introduced the witnesses thereto upon the question of their execution and the capacity of the testatrix, rested. The appellants then presented evidence, claimed as tending to establish the want of such capacity, and undue influence exercised by one Cushman, the residuary legatee, to which the appellees replied with counter-evidence.

Concerning the relations which existed between the testatrix and Cushman, the finding is as follows: The testimony of the parties was in substantial agreement in establishing the following facts: In or about 1878, Mr. Heap, husband of the testatrix, died. Mrs. Heap was then left alone, without near relatives, in Willimantic. She was, and for many years had been, the owner of property, a part of which consisted of real estate in Willimantic, and on a part of which she resided. Mr. Cushman had been a friend of Mr. Heap during his last years, and soon after the latter's death became managing agent of Mrs. Heap's property. A power of attorney was executed by her to him for the purpose, and all her property then passed into his management. From this time until Mrs. Heap's death he remained her confidential friend and business adviser, and continued in the management of her prop-

erty, she placing great trust in and reliance upon him. During the later years of Mrs. Heap's life Cushman became an inmate of her house, and there remained, caring for her and her property, until her decease. She died June 4, 1887, aged eighty-five years, leaving as her nearest kin twenty-eight nephews and nieces, among whom are the appellants.

In reference to the circumstances attending the execution of the will and codicil, the finding states that the evidence was practically confined to the testimony of the attorney who draughted them, which it states as follows:—

"A few days prior to the execution of the will, Cushman, whose employment was in Hartford, and whom he well knew, came to him, and requested him to go to Willimantic and draught a will for an old lady there, naming the testatrix. During the conversation, Cushman stated that she had spoken of her desire to make her will, and had told him in general what she proposed to do, and asked him who a suitable man to draught it would be. Cushman knew the witness, and had upon several occasions employed or consulted him. The witness testified that he presumed that he had been Cushman's usual attorney. Cushman told the witness that he had suggested him as a proper man to draught the will, and that Mrs. Heap had requested him, Cushman, to obtain the witness for that purpose. Cushman told the witness that Mrs. Heap had said that she proposed to remember certain of her relations, and to make him a handsome legacy. During the conversation something was said about the amount of her estate, and witness understood Cushman to reply to an inquiry from him, that it was about twelve thousand dollars; but the witness was unwilling to say that the expression was not used of the amount of personal estate in Cushman's hands, although the witness did not at the time so understand it. Upon a day set, the witness went to Willimantic, and was introduced to Mrs. Heap by Cushman. Cushman immediately left the witness and Mrs. Heap alone together. They discussed at length, and alone, the provisions of her will, Mrs. Heap giving him *data* as to her wishes, and explaining at length her reasons for much of her action. The witness took memoranda as she stated what she desired. He then draughted the document, and read it carefully over to her. She expressed her satisfaction. Thus far no one had been present. At this point Cushman was summoned and asked to procure two witnesses. He went out and obtained them, and soon returned with them. The

document was thereupon executed, Cushman being present. The witness stated that the instrument was Mrs. Heap's will, but did not at any time state anything as to its provisions. Neither Cushman nor any other person was informed of the contents of the will until after its execution and the witness's departure. Memoranda for the codicil, together with the will, were brought to the witness in Hartford by Cushman, for him to draught the codicil, which he did, returning it and the will to Cushman. The witnesses to the codicil testified that it was executed in Cushman's presence, and that they were requested by him to act as witnesses. The witness charged his services on book to Mrs. Heap. Payment of the bill was afterwards made by Cushman."

The estate inventoried \$27,689.62, of which \$12,000 was real and the balance personal estate. By the provisions of the will, the sum of two hundred dollars is given to each of twenty-five nephews and nieces. To one of these nephews the additional sum of one hundred dollars a year is given, during the life and conditioned on the support of his father, the brother of the testatrix, who died shortly after. A gold watch is also bequeathed to one Kate Clark, and the will then concludes as follows: "All the rest of my property of every kind I give absolutely to my friend E. McCall Cushman, of Hartford, Connecticut. I do this as only a just reward for his faithful care of all my affairs for many years; for his constant friendship to me personally; and for my great esteem for him and confidence that he will make the wisest and best use of the property given him." In the will it is provided that if any of the nephews and nieces named as legatees shall have died, leaving children, such children are to take the legacy. By the codicil, this provision and the bequest of the watch are revoked. The will is dated October 1, 1885, and the codicil March 16, 1886.

The appellants' first witness was John L. Richmond, who, having testified as to Cushman's management of Mrs. Heap's affairs, and the power of attorney therefor having been laid in, was asked upon direct examination, "Do you know the value of her property in 1878 or 1880?" Upon objection being made, the counsel for the appellants claimed it to show what property Cushman had control of, adding: "The object of this inquiry is to show all the relations that existed between this man and this woman from the time he came there and took hold of the property; whether she was a woman of large or small means." To a question by the court, the witness said

he knew nothing of the matter except from a conversation with Mrs. Heap. The court ruled that at this stage, and until further reason for its relevancy appeared, he should exclude the question.

During the trial the appellants offered in evidence three assessment lists made out and sworn to by Mr. Cushman, as the agent of Mrs. Heap, of her taxable property for the years 1883, 1885, and 1886. This testimony was excluded.

The appellants further offered to lay in the inventory and distribution of the Lord estate, as tending to show what the amount of property was that came to Mrs. Heap in 1866, either directly or indirectly. On objection, it was stated that it was proposed to follow it up with proof that she had the same property in 1879, and it was claimed as tending to show the amount of her property to have been thirty thousand dollars or upwards. The court declined to receive the evidence, but stated that if counsel had evidence as to her property at later dates, he would consider and rule upon the question when such evidence should be offered.

We cannot well understand why all the evidence so presented should not have been received. It was incumbent upon the appellants to show the existence of a confidential relation between Cushman and the testatrix. To this extent, undoubtedly, the burden was upon them; and they had assumed and were endeavoring to support it. The court, indeed, as we shall hereafter see, went further, and held that proof of the existence of such relation did not shift or raise the appellants' burden, upon the issue of undue influence. Clearly, the facts and circumstances surrounding the relations between Cushman and the testatrix had a direct, positive, and important bearing upon this question, and the amount, situation, and character of the property with which Cushman was intrusted, during any and all portions of his stewardship, as well as the degree of knowledge which the testatrix possessed in regard to the same, and the conduct of Cushman in imparting information upon the subject to her or in withholding it from her, were relevant and important. Evidence upon these points would have disclosed the degree of confidence reposed. It was one of the elements by which it would be made to appear how far the provisions of the will in his favor were reasonable, and in fact, to use its own language, "only a just reward for his faithful care." Without this element, the remaining factors might be insufficient for the solution of the

problem. We think the evidence was admissible, and its exclusion erroneous.

During the trial, a witness for the appellants having undertaken to compare the mind and memory of the testatrix, as regarded the amount of property she was worth and the disposition she wished to make of it, with that of an average child of seven or eight years, upon objection and motion made to strike out that portion of the answer, the court granted the motion, saying that the witness might state her opinion of the strength of Mrs. Heap's memory, or of the extent of her knowledge of her property, or the like, but not comparatively; which the witness did. Although we should have hardly been disposed to grant a new trial on this ground alone, since it does not appear very probable that any injury resulted to the appellants in consequence of this ruling, we nevertheless think that the witness should have been allowed to make the comparison. It may be correct, as the appellees claim, that there is no such thing as an average child, and that the mind and memory of a child is incapable of perfect measurement. This is true of almost any standard. It would be true of the standard which the law prescribes for the determination of reasonable care and prudence. It is nevertheless true that such a comparison carries with it, to an ordinary apprehension, a greater approximation to certainty than any merely general and abstract statement. The words "childish," and "second childhood," are used in common parlance, and so used because they fittingly and adequately express a clearly defined idea. That eminent jurist Judge Seymour, in a charge to a jury, reported in the appendix to 89 Connecticut, 591, says that the main difficulty in questions of this sort arises from the want of a definite measure of mental capacity; and then adds: "I can give you no precise rule, but I think it clear that if the prisoner's perception of consequences and effects was only such as is common to children of tender years, he ought to be acquitted."

It is found that "before the appellants closed their case they requested the counsel for the appellees to produce and deliver to them for their examination all books kept by Mr. Cushman, and containing accounts of his stewardship with Mrs. Heap, as her agent. The counsel for the appellees declined to do so. The counsel for the appellants thereupon asked the court to order such production. The court declined

to do so. Mr. Cushman was at the time, and throughout the trial, in court."

We find no error in this. With the existing statutory provisions in regard to discovery (Acts of 1889, c. 22), and with the power of parties to compel the attendance of witnesses and adverse parties for examination, and to call them when, as in this case, present, the exercise of the extraordinary power invoked is best intrusted to the sound discretion of the trial court, to be granted or withheld as circumstances seem to warrant; and there we prefer to leave it.

During the argument, one of the appellants' counsel claimed the right to read, as a part of his argument to the jury, paragraph 88, section 1, page 509, and paragraph 88, section 37, page 526, of Redfield on Wills; but upon objection being made, the court declined to permit him to do so. This ruling is so clearly in accordance with the decision of this court in *Baldwin's Appeal*, 44 Conn. 37, that it seems at first thought strange that the question should again be raised. We are, however, aware that the later decision in *State v. Hoyt*, 46 Conn. 380, has been regarded by some members of the profession as somewhat modifying the doctrine of the earlier case; especially since, although the former was a civil and the latter a criminal case, yet as the subject-matter of the proposed reading in the latter belonged exclusively to the realm of fact, and not of law, it is perhaps difficult to see how, on principle and in reason, a distinction can be drawn between the two classes of cases; and this has doubtless led to some question. And as the rule upon this subject is one calling for very frequent application in the trial of causes, it seems most important that it should be definitely and positively stated, and clearly and fully understood. We will therefore say that the ruling in *State v. Hoyt*, 46 Conn. 380, must be regarded as confined exclusively to cases where the plea of insanity is interposed in behalf of persons indicted or informed against; the allowance in such cases forming an exception, based upon a practice which the majority of the court in that case felt had so hardened into a rule that they were not at liberty to abrogate it; that in all other cases the decision in *Baldwin's Appeal*, 44 Conn. 37, fully applies; and that facts relevant to the cause cannot, except within the limits of certain defined and recognized exceptions, be proved by reading from published books, or given to the jury except under the sanction of an oath and the test of cross-examination; while the reading to the court

or jury of such books of science, art, or purely technical knowledge, necessary for an accurate apprehension of any relevant matter, as have been shown in evidence to be recognised by experts as standard authority, and by such proof in effect incorporated in and made part of the testimony of such witnesses, may be allowed or refused by the trial court in the exercise of its judicial discretion. To this extent the allowance of such reading would seem to fall within the reason of the decision in *Tompkins v. West*, 56 Conn. 478.

The appellants filed twenty written requests to charge. These requests were only partially complied with. Some of those refused were clearly incorrect, while others appear to possess merit. For the sake of greater brevity, we will, however, confine our further consideration to two points in the charge as actually made. On the question of testamentary capacity, the court, in addition to declaring the rule correctly as this court has established it, that the law merely requires that the testator should be possessed of sufficient intelligence and memory to fairly and rationally know and comprehend the effect of what he is doing, and the nature and condition of his property, to understand who are or should be the natural objects of his bounty, and his relations to them, the manner in which he wishes to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will he is making, further said: "Mere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary capacity. One's memory may be failing, and yet his mind not be unsound. One's mental powers may be weakening, and still sufficient testamentary capacity remain to make a will."

This is also undoubtedly true; but such facts are admissible in evidence upon the question of capacity, and it was mainly by the proof of their existence that the appellants sought to establish the want of such capacity. The court, therefore, in charging as it did, and in entirely failing to make reference in any portion of the charge to the significance of such facts as evidence, would seem rather, in effect, to have withdrawn them from under the eyes of the jury, and from their consideration of them as such evidence, and thereby may, and we fear must, have misled the jury, to the injury of the appellants.

Upon the question of undue influence, the court charged the

jury as follows: "If a paper is executed with the requisite formalities of a will, and the person signing it is shown to have sufficient capacity to make a will, the presumption is, that it was executed freely and without undue or improper influence, until the contrary appears, and the burden of proof is therefore upon the party alleging undue influence. That burden, however, becomes shifted whenever the person who draughts the will or participates in procuring its provisions from the testator also occupies a relation of special confidence toward the testator, and at the same time is made specially benefited by the terms of the will. The reason of this rule is, that his confidential relations may have enabled him to exercise a controlling influence over the testator in his own behalf in procuring the provisions of the will from the testator. The burden is therefore placed upon him to show, by a fair preponderance of proof, the fairness of his own conduct. This rule applies only when the beneficiary or the confidential person draughts the will, or takes part in procuring from the testator its terms and provisions for some one else to reduce to writing. It does not apply where the confidential relation only exists between the testator and the beneficiary. There must be some participation in the procurement of the will."

We think the jury would have been fully warranted, from the evidence disclosed by the finding of the nature, character, and extent of the confidential relation between the beneficiary and the testatrix, in the inference and presumption that such beneficiary did take part in procuring from the testatrix the terms and provisions of the will, without direct and positive proof of the fact, and that their right to draw such inference should have been stated to them by the court. The mere existence of a confidential relation would not, indeed, in all cases, and necessarily, raise such presumption, especially when it appeared that the opportunity of familiar and secret communication and intercourse between the testator and the beneficiary, at a time proximate to the execution of the will, was wanting; but whenever a legacy is given to an attorney, confidential adviser, guardian, or other person sustaining a relation of special confidence to a testator, or whenever the individual who prepares the instrument or conducts its execution, not being a relative who would in the absence of a will be an heir, derives a benefit from its provisions, in either instance the surrounding circumstances may be such that a presumption, similar in character in each case, would naturally

arise against the volition or knowledge of the testator; and if, in this regard, the rules of law are to correspond with those of reason, such presumption, in the absence of rebutting proof or explanation, should justify the finding of a jury that undue influence existed. When evidence, therefore, either of actual participation in the procurement of a will or of the existence of a confidential relation is offered, the ordinary presumption that the instrument was executed freely, and without undue or improper influence, may or may not in fact have so given place or been overcome in the minds of the jury, that evidence in rebuttal or explanation would be required to dispel the inference of undue influence. This can only be determined by the verdict. The proponents having assumed the responsibility of deciding whether to offer such evidence, and the trial being closed, the jury should be guided to a careful and well-grounded verdict by a charge from the court, in which the principles of law are fitted and adapted to the evidence adduced.

The doctrine above stated is in accordance with the former decisions of this court: *St. Leger's Appeal*, 84 Conn. 434, 450; 91 Am. Dec. 735; *Drake's Appeal*, 45 Conn. 9; and the language of Judge Pardoe, delivering the opinion of the court in *Dale's Appeal*, 57 Conn. 143.

There is error in the judgment appealed from, and a new trial is ordered.

PRESUMPTION OF UNDUE INFLUENCE. — In regard to wills, it may be stated as a general rule that the existence of a confidential relation between the testator and a legatee, such as guardian and ward, attorney and client, physician and patient, or religious adviser and layman, gives peculiar opportunities outside of the family relation for unduly influencing the mind of a testator, and creates a grave suspicion that such influence was exercised; so that whenever it appears that the will was executed through the intervention of one occupying such favored relation to his especial advantage, the presumption of undue influence arises, and the suspicion must be put to rest by evidence adduced to sustain the validity of the will by showing it to be the free and voluntary act of the testator.

The rule is thus announced in a late case: "When confidential relations exist between two persons, resulting in one having an influence over the other, and a business transaction takes place between them resulting in a benefit to the person holding the influential position, the law presumes everything against the transaction, and casts the burden of proof upon the person benefited, to show that the confidential relation has been, as to that transaction at least, suspended, and that it was fairly conducted as between strangers": *Pitoni v. Corrigan*, 47 N. J. Eq. 100.

The existence of confidential relations between the testator and legatee or devisee excites the suspicion and jealousy of the court, and casts upon the

proponent of the will the duty of showing by affirmative evidence the testator's capacity, volition, and free agency: *Daniel v. Hill*, 52 Ala. 430; *Moore v. Spier*, 80 Ala. 129; *Jones v. Roberts*, 37 Mo. App. 163; *Herster v. Herster*, 116 Pa. St. 612; *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712. Thus where the relation of guardian and ward existed at the time of the execution of a gift or devise from one to the other, and the parties were so situated with reference to each other that undue influence could have been used, the law presumes that it was used, and the one seeking to derive advantage from the gift or devise must rebut the presumption by competent and convincing proof: *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465; 100 Am. Dec. 314, and note 324; *Budwell v. Swanek*, 84 Mo. 455, where a bequest to the wife of the guardian by the ward was held to be within the operation of this rule.

Again, where a person makes a will in favor of his priest, or spiritual or religious adviser, to the exclusion of the heirs and natural objects of the testator's bounty, the law presumes undue influence, and some proof besides the making of the will is required, in order to sustain it: *Mara v. McGlynn*, 88 N. Y. 357; *Schofield v. Walker*, 58 Mich. 96. So where a convert to spiritualism, whose life was dominated thereby, and who was influenced by the person through whom he had embraced that belief to become alienated from his wife and child, and to make a will in favor of his adviser, these facts are sufficient to raise the presumption of undue influence: *Thompson v. Hawks*, 14 Fed. Rep. 902. But where a testatrix, by will executed five days before her death, gave the bulk of her estate to her spiritual adviser, to the exclusion of her sisters, but there was no direct evidence of undue influence, and the testatrix had formerly expressed an intention to omit her sisters from her will, it was decided that the presumption of undue influence did not arise: *Figueras v. Taaffe*, 6 Demorest, 166. An attorney who, being the testator's legal adviser, draws a will containing a legacy to himself must show affirmatively an absence of undue influence: *Post v. Mason*, 26 Hun, 187. So in *Riddell v. Johnson*, 26 Gratt. 152, it is determined that where an attorney writes a will under which he takes a benefit, it is a circumstance to excite the suspicion of the court, and to call upon it to be vigilant and jealous in examining the evidence in support of the will, which ought not to be pronounced valid until the suspicion is removed, and it is satisfactorily established to be the free and voluntary act of the testator. Thus where the testator was an aged man, and it appears that his mind, originally strong, was impaired, and that the will was prepared by his confidential adviser, who was made a devisee, to the deprivation of legatees named in a former will, the burden of proof is on such confidential adviser and beneficiary to show affirmatively that at the time of the execution of the last will the testator was informed and had knowledge of the approximate amount of his estate, and the proportionate amount thereof which would pass to such devisee thereby, and that the testator's mind was free from undue influence exercised by such adviser: *Yardley v. Outhbertson*, 108 Pa. St. 395; 56 Am. Rep. 213. Where the testator is aged, the fact that a person whose advice has been sought and taken by the testator receives a large benefit under the will raises a presumption of undue influence, and the burden rests on the beneficiary to rebut the presumption affirmatively, and show mental capacity and the absence of undue influence: *Wilson v. Mitchell*, 101 Pa. St. 495.

While the mere fact that a will was written by a person who takes a benefit under it is not sufficient to invalidate it, still if the bequest to him is large, and he is a stranger to the testator's blood, the will will be scrutinized

with suspicion, and proof of due execution and testamentary capacity alone will not uphold it, and the beneficiary will be required to show clearly and satisfactorily that the testator knew its contents; and while undue influence such as will vitiate the will must, in a measure, destroy the testator's free agency, and cause him to dispose of his property contrary to his desire, yet where a confidential relation, such as principal and agent, existed between the testator and the beneficiary under the will, and continued to the testator's death, the presumption of undue influence arises, and affirmative proof is required to overcome it: *Lyons v. Campbell*, 88 Ala. 462.

If a testator is under guardianship as a *non compos mentis*, he is *prima facie* incapable of making a will, and a presumption of undue influence arises against his guardian, who is also made a legatee and executor under such will, and it is incumbent on the latter to show affirmatively, beyond a reasonable doubt, that the testator had both mental capacity and freedom of will and action, such as are requisite to render a will legally valid: *Breed v. Pratt*, 18 Pick. 115. Accordingly, where a testator seventy years of age had been an habitual drunkard for fifty years, and his appetite for drink was so uncontrollable as to amount to a burning passion, and several years prior to his death he had inherited some money, at which time a guardian of his person and property was appointed, and he subsequently went to live with his brother, who offered him a home so long as he should live, with full and free consent and opportunity to drink when and what he pleased, and who resisted the efforts of his guardian to remove him, and that the testator had been drinking on the day that he executed his will making his brother sole legatee, these facts are sufficient to raise a presumption of undue influence, and to justify the jury in finding that it was exercised: *Will of Stinger*, 72 Wis. 22.

Where a will is unnatural in its provisions, and inconsistent with the duties and obligations of the testator to the members of his family, the presumption of undue influence is raised, and the burden of proof is thrown on the proponents of the will to give at least some reasonable explanation of its unnatural character, and to show that it was not the result of mental defect or perversion: *In re Budlong*, 18 Civ. Proc. Rep. 18.

Accordingly, where a testator, without apparent cause, virtually disinherited four out of six of his children, or their descendants, giving to two sons substantially all his property, such gross inequality in the disposition of his estate places on the proponents of the will the burden of proof to show its validity and freedom from their undue influence: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712. And again, where the estate was large, and was bestowed upon one daughter, to the exclusion of other children having equal claim upon the bounty of the testator, the favored child being alone present at the time of the execution of the will, and the transaction kept secret from the other children, while the testator sustained relations of confidence toward the beneficiary, and during such relation became imbued with a groundless suspicion and aversion of a son with whom such testator had formerly lived, and who had been misled by him, while it also appeared that the testator, during his last sickness, made large donations to the legatee named in the will, and one day before his death canceled a mortgage held against such legatee, all of which was kept secret from the other children of the testator, these facts raise a presumption of undue influence: *Greenwood v. Oline*, 7 Or. 18. If a will was copied from a writing made by one who, by its terms, was to receive a large part of the testator's estate, to the exclusion of his heirs, and the testator was aged, infirm, and unable to read, the presumption of

undue influence arises, and proof alone of the formal execution of the will does not entitle it to probate. The beneficiary must also show that the testator correctly understood the contents of the paper signed by him: *Kelly v. Suttageat*, 68 Tex. 13. In *Byard v. Oconover*, 39 N. J. Eq. 244, where a single man seventy-two years of age, while in a dying condition, signed a will giving all his property to his housekeeper, who had lived with him for a number of years, and who had prepared the paper four years previously, and had repeatedly requested him to sign it, and none of the testator's brothers or sisters were present at the formal execution of the will, or informed thereof, although one brother lived in an adjoining house, it was decided that these facts raised a presumption of undue influence and want of capacity in the testator to execute his will, and it was accordingly refused probate. If a testator, after making his will, became an inmate of the house of his brother-in-law, and being feeble and decrepit, was detained there against his will, plied with false statements regarding the beneficiaries in his will, and thus induced to alter it in favor of other persons, the presumption of undue influence is raised, and the burden of proof is on those claiming under the will to show that it was the free act of the testator: *Suenarton v. Hancock*, 22 Hun. 38.

The mere fact that the person writing the will is made a legatee under it, while it is a suspicious circumstance, does not, it seems, alone raise any legal presumption of undue influence. Thus the fact that a will was drawn by a favored legatee does not, of itself, invalidate it: *Rusling v. Rusling*, 36 N. J. Eq. 603. Nor will the fact that the draughtsman of the will was made the executor, and that his relatives received a large part of the property devised, raise any presumption of undue influence over the testator: *Carter v. Dixon*, 69 Ga. 82; *Waddington v. Busby*, 45 N. J. Eq. 173. Nor does the mere fact that the draughtsman of a will, who has been the testator's attorney for a long time, is made a legatee raise such presumption: *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689. Nor is the presumption raised by the facts that it was drawn by the confidential friend of the testator and that his wife was a beneficiary: *Montague v. Allan*, 78 Va. 592; 49 Am. Rep. 394. The fact that the sole beneficiary under a will was the confidential business adviser of testatrix several years before her death does not cast the burden on him of proving the will to be the free act of the testatrix, where there is no evidence that such beneficiary took advantage of his position or relation, or that he participated in the preparation or execution of the will, or even knew of its existence and contents until some time subsequent to its execution: *Wheeler v. Whipple*, 44 N. J. Eq. 141.

The presumption of undue influence does not arise from business or social relations existing between the testator and legatee or devisee in all cases. Therefore the fact that the principal beneficiary was a partner of the testator at the time of his death, and for many years before, is not sufficient, of itself, to raise the presumption: *Estate of Brooks*, 54 Cal. 471. Nor does the fact that the will was made in favor of one with whom the testatrix had not formerly been on friendly terms raise the presumption: *Estate of McDonald*, 130 Pa. St. 490.

The rule that the presumption of undue influence does not arise in all cases is especially strong in regard to family relations existing between parent and child, husband and wife, etc. Lawful influence, such as arises from legitimate or social relations, must be allowed to produce its natural results upon last wills; and there can be no presumption of its unlawful exercise merely from the fact that it may be known to have existed, and may, to some extent, have operated on the testator's mind. A will will not be con-

demned on account of inequalities in testamentary dispositions produced by such influence. It is only when it is exerted over the very act of devising that it is presumed to be vicious and undue: *Sechrest v. Edwards*, 4 Met. (Ky.) 163. There is no legal presumption against the validity of any provision which a husband may make in his wife's favor, for she may justly influence the making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently, or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent: *Latham v. Udell*, 38 Mich. 238. Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence, to vitiate the will: *Hughes v. Murtha*, 32 N. J. Eq. 288. And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise the presumption of undue influence on her part: *Rankin v. Rankin*, 61 Mo. 295. When a husband had made two wills, dividing his property between his wife and his sister, and a few days subsequent to the making of the second will, and after several days of his last illness, he made another will, revoking the former ones, without apparent reason, and leaving all his property to his wife, this, in the absence of any other evidence of undue influence, will not raise the presumption of such influence so as to require the submission of that question to the jury: *Will of Nelson*, 39 Minn. 204.

In support of this rule, it was said in *Small v. Small*, 4 Me. 220-423, 16 Am. Dec. 253, that if a wife, by her virtues, has gained such an ascendancy over her husband, and has so riveted his affections, that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should be proved she possessed a powerful influence over his mind and conduct in the general concerns of life, unless there should be proof that such influence was specially exerted to procure a will of such a kind as to be peculiarly acceptable to her, and to the prejudice and disappointment of others.

Where the husband of a testatrix asked an attorney to come to his dwelling, as his wife wanted him to draw her will, and the attorney being busy, he wrote a will in accordance with statements made by the husband as to what his wife wished the will to contain, and subsequently took the will to the wife, who was ill, and reading it to her, asked her if it contained what she wished, and receiving an answer in the affirmative, she then executed the will in due form, giving all her property to her husband, with direction to give their grandson, their only descendant, a collegiate education, though the testatrix was over seventy years of age, it was decided that these facts were not sufficient to raise a presumption of undue influence on the part of the husband: *Armstrong v. Armstrong*, 63 Wis. 162. The fact that the wife of a testator had both opportunity and motive, and that the will makes provision for her beyond what the law would have given her, creates no presumption of undue influence, nor does the additional fact that the will was executed six weeks after the testator had drawn a radically different will, in accordance with a draught submitted to him by his father: *Mason v. Williams*, 53 Hun. 398.

Mere bad treatment of her children, exerted or exercised by the wife many years previous to the making of his will by the husband, although coupled with their disinheritaunce, does not necessarily raise the presumption of undue advantage taken by the wife; but in order to have that effect, it must be

followed with proof showing that undue influence was acquired by her in consequence, and that it existed at the time that the will was executed: *Thopley v. Congill*, 48 Mo. 291. The presumption that undue influence was exerted by a mother on the testatrix is not raised, where it appears that the latter had been obliged, by her husband's cruelty, to leave him, and return to her mother's house, where she died, leaving a will making the mother her sole legatee, and desiring her to have the care and custody of the testatrix's infant child in preference to the father: *Will of Andrews*, 33 N. J. Eq. 514.

Inequality, or even injustice, towards some of the testator's children, in the amounts given them by the will, does not raise the presumption of undue influence. It is not raised by proof of interest and opportunity alone: *Turner v. Turner*, 36 N. J. Eq. 437. Nor does such presumption arise from the fact that the testator was on his death-bed, surrounded by certain of his children, who were benefited by his will, while another child, who is the contestant, was absent: *Bundy v. McKnight*, 48 Ind. 503. The facts that the testatrix was eighty-one years of age at the time of the execution of the will, and that she thereby gave to her daughter, with whom she and her husband had lived for more than twenty years, a larger share of her estate than she gave to her other daughters, although such legatee and her husband had received compensation for taking care of the testatrix's husband, who died before her, is not sufficient to raise the presumption of undue influence by such daughter over the testatrix: *Kies v. Heath*, 33 N. J. Eq. 239. So where a mother gave nearly all of her property to one of two sons, by will, at a time when she had resentment against the other son, because of a business transaction between them, and the son receiving the bulk of her estate was her business adviser and amanuensis, and gave instructions for the drawing of the will, and aided her in obtaining it from the attorney who drew it, it was decided that in the absence of proof of threats, restraint, or coercion of any kind, or of importunity or persuasion, inducing her to make the will, the presumption of undue influence was not raised: *Dale v. Dale*, 36 N. J. Eq. 269.

The services of a friend or relative of a testator may be lawfully urged as an argument to persuade him to the giving of a legacy, without raising the presumption of undue influence. Something is due to the dictates of humanity, and it must not be said of the child who attempts to soothe the last sufferings of a parent, that he is guilty of imposition, even if the allegation is made by those who have shielded themselves from suspicion of influence by carefully abstaining from offices of affection: *Estate of Williams*, 13 Phila. 302. So mere proof of earnest solicitations on the part of such beneficiaries in procuring a will to be in their favor will not raise such presumption: *Wait v. Breese*, 18 Hun, 403; since motives of natural affection and gratitude on the part of the testator, and solicitations or arguments which appeal to such motives, do not constitute undue influence: *Will of Jackman*, 26 Wis. 104; *Will of Gleespin*, 26 N. J. Eq. 523; *McCulloch v. Campbell*, 49 Ark. 367, where it was decided that the beneficiaries under the will, having by kind offices and congenial intercourse acquired considerable influence over the testatrix, and having requested her to make provision in her will in their favor, is not sufficient to establish the presumption of undue influence.

It has been often decided that the mere existence of an undue or improper influence operating, but not exercised by the person possessing it, upon the mind of the testator when he executes his will is not sufficient to raise a legal presumption of undue influence sufficient to invalidate the will. It is not the existence, but the exercise, of an improper influence in the very act of making the will which invalidates it. This rule is applied where illicit

relations have existed between the testator and the beneficiary: *Sunderland v. Hood*, 84 Mo. 233; *Wainwright's Appeal*, 89 Pa. St. 220. The mere fact that a testator devised all his estate to a woman with whom he lived as his wife, when she was in fact the lawful wife of another, and though he excluded his brother and sister from taking under his will, does not authorize an instruction that the law presumes undue influence on the part of the devisee, and that, in the absence of contrary proof, the jury must find against the will. Undue influence cannot be presumed from the act of unlawful cohabitation: *Perechet v. Perechet*, 92 Ky. 93; 56 Am. Rep. 688. So in an issue of *devisee vel non* on the allegation of undue influence by the mother of an illegitimate child, the unlawful cohabitation of the mother with the testator is not, of itself, sufficient evidence from which a jury could infer undue influence: *Andy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 233. And in *Monroe v. Barclay*, 17 Ohio St. 392, 93 Am. Dec. 620, it was decided that a will produced by influences springing from an unlawful and illicit relation between the legatee and the testator will not raise the presumption of undue influence, unless it appears that such influences were exerted in restraint of the will of the testator, and prevented him from disposing of his property in accord with his own wishes. To the same effect is *Sunderland v. Hood*, 13 Mo. App. 232. And see also *Dickie v. Carter*, 42 Ill. 376, where it is determined that if the devisee has had improper intercourse with the testator, no matter how immoral the relations may have been, this, of itself, is not sufficient to invalidate a will in favor of the wrong-doer, if no improper influences are shown to have been exerted to induce the will. So in *Main v. Ryder*, 84 Pa. St. 217, the testator had abandoned his lawful wife and children, and lived for many years in adultery with a woman alluded to in his will as his wife. He had by such woman several children, and made her and such children devisees of a large portion of his estate. The court said: "These circumstances do not create a presumption that the will was executed under improper influences, and while the illicit relation should be considered in determining the question of undue influence, the effect of such influence is a question of fact for the jury." This ruling is in accord with that in *Dean v. Negley*, 41 Pa. St. 312, 80 Am. Dec. 620, sometimes cited as maintaining a contrary doctrine; but whether it does, or not, is immaterial, as the rule of *Main v. Ryder*, 84 Pa. St. 217, is concurred in by other decisions in the same state, as in *Wainwright's Appeal*, 89 Pa. St. 220, where it appeared that the testator and the devisee unlawfully cohabited together, it being alleged that the testator had been falsely accused of seducing her many years before, and it also appearing that when the will was executed, every one but the draughtsman, an attorney, was excluded from the room when the instructions were given. It was decided that these facts were not sufficient to establish a presumption of undue influence over the mind of the testator in the testamentary act, nor to justify a verdict against the will.

When a woman makes a will in favor of her husband, knowing, when she married the devisee and when she made the will, all the facts in relation to his former matrimonial alliances, though she may not have known their legal effect, the fact that he had a wife living at the time of his marriage to the testatrix, and at the time of the execution of the will, is not sufficient to raise a presumption of undue influence on his part, or to invalidate the will, *Will of Donnelly*, 68 Iowa, 126. An extended note on the topic of "What Influence or Importunity Invalidates a Will" is appended to *Small v. Small*, 16 Am. Dec. 257, where many cases analogous to those cited in this note are referred to.

Whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract, or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every such transaction between them by which the superior party obtains a possible benefit, equity raises a presumption of undue influence, and casts upon that party the burden of proof to show affirmatively his compliance with equitable requisites, and of entire fairness on his part, and freedom of the other from undue influence: *Todd v. Gros*, 33 Md. 188; *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84.

In *Delins v. Withers*, 94 N. C. 581-591, it was said: "The cases in which the law will presume fraud, arising from the confidential relations of the parties to a contract, are executors and administrators, guardian and ward, trustees and *custui que trust*, principal and agent, brokers, factors, etc., mortgager and mortgagee, attorneys and clients, and to those have been added, we think very appropriately, husband and wife. The rule is founded on the special facilities which, in such relation, the party in the superior relation has of committing fraud upon him in the inferior situation; and the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been just, honorable, and honest, not so much because he has committed fraud, but that he may have done so." Under this rule, the phrases "confidential relations" and "fiduciary relations" are convertible terms, although the relationship of first cousin is not within either: *Robins v. Hays*, 57 Cal. 498; and the principle applies to every possible case in which a fiduciary relation exists as a fact; that is, where confidence is reposed on one side and the resulting superiority and influence may exist on the other: *Van Hype v. Van Hype*, 9 Paige, 237. Undue influence is a species of constructive fraud, which the courts will not undertake to define by any fixed principles, but its exercise will be inferred in all cases of confidential or quasi confidential relations, where the person receiving a gift or other like benefit may have so influenced the mind of the donor or grantee, by improper acts or circumvention, as to induce him to confer the benefit contrary to his deliberate judgment, reason, and discretion: *Shipman v. Furness*, 69 Ala. 555.

Perhaps the best illustration of the rule is the relation of trustee and *custui que trust*, in its strict sense. In cases involving this relation, it is conclusively settled that the trustee cannot deal with the trust fund for his own benefit. If he does so without the consent of the *custui que trust*, the transaction is presumptively invalid, regardless of his good or bad faith: *Dwight v. Blackmar*, 2 Mich. 330; *Shelden v. Rice*, 30 Mich. 296; *Hammond v. Stanton*, 4 R. I. 65. And when he deals directly with the beneficiary, the presumption is also against him, and the burden of proof is upon him to show an adequate consideration after putting the beneficiary upon an equal footing with himself: *Spencer and Newbold's Appeal*, 80 Pa. St. 317; *Jones v. Smith*, 33 Minn. 216; *Gruen v. Waterman*, 63 N. Y. 657. This rule applies with equal force to an executor or administrator: *West v. Waddell*, 33 Ark. 575; *Humphreys v. Burton*, 72 Ala. 1; and to a guardian; for in such case undue influence is, on the ground of public policy, *prima facie* presumed from the peculiar relations existing between the parties: *Alston v. Thompson*, 32 Minn. 25; *Tunk v. Beckler*, 43 Iowa, 415. And it devolves upon the guardian to show, by the clearest proof, that he dealt with the ward exactly like a stranger, taking no advantage of his influence over him, or of his superior knowledge in relation to the subject-matter of the transaction, and that the ward's act was the result of his own volition, and upon the fullest deliberation: *Meek v. Perry*, 26 Minn. 190.

All transactions between guardian and ward, to the benefit of the

guardian, occurring during or shortly after the period of minority, are presumptively void, and cannot be upheld except upon proof of the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian: *Ferguson v. Lowery*, 54 Ala. 510; 25 Am. Rep. 718, and note 728; *Berkmeyer v. Kellerman*, 32 Ohio St. 239; 30 Am. Rep. 577; *Ashton v. Thompson*, 32 Minn. 25.

The rule is applicable to dealings between parent and child, and courts will carefully scrutinize them to protect either against any undue advantage being taken by the other: *Wood v. Rabe*, 96 N. Y. 414.

A voluntary conveyance by a child to its parent, during minority or within a short time thereafter, and while still under the parental control, is presumptively void. The burden is upon the parent to show, in the clearest and most satisfactory manner, that it is in every particular worthy of receiving the sanction of a court of equity: *Miller v. Simonds*, 72 Mo. 669, where a deed by a daughter conveying a life estate to her father was executed on the eve of her marriage, improvidently, without time for deliberation, and without any independent advice, was set aside, although the daughter testified that the father used no undue influence to induce her to sign the deed. So in the case of a voluntary deed from a son to a father, especially if the former is in an enfeebled state of health, casts the burden of proof on the father to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and equitable: *Miskey's Appeal*, 107 Pa. St. 611; *Brundage v. Yates*, 67 Mo. 221; *Williams v. Williams*, 63 Md. 371.

The same rule applies to donations made by a child to a parent recently after the child attains majority, or while he is under the constant and immediate influence of the parent, or while his property is in the possession or under the control of the parent: *Ashton v. Thompson*, 32 Minn. 25.

A presumption of undue influence arises against a child in cases of gifts or conveyances to him from his aged or infirm parent, and the burden of proof is upon the beneficiary to show the entire good faith of the transaction: *Sparver v. Hall*, 62 Iowa, 498; *Fitch v. Reiser*, 79 Iowa, 34.

Dealings between attorney and client, such as gifts, conveyances, or contracts by the client, including securities given by him during the continuance of the relation, are carefully scrutinized in equity. A presumption of undue influence and undue advantage by the attorney exists against him, requiring him to assume the burden of showing the greatest fairness and rectitude in the transaction. If he fails to make such proof when seeking to uphold the transaction, equity will treat it as a case of constructive fraud: *Gray v. Emmons*, 7 Mich. 532; *Jennings v. McConnel*, 17 Ill. 148; *Rogers v. Marshall*, 3 McCrary, 76; *Nesbit v. Lockman*, 34 N. Y. 167; *Savery v. Sypher*, 6 Wall. 157; *Dona v. Record*, 63 Me. 17; *Harper v. Perry*, 28 Iowa, 57. The attorney is bound to show that his client was fully informed of his rights and interests in the subject-matter of the transaction, and the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arm's-length: *Kielling v. Shaw*, 33 Cal. 426; *Whipple v. Barton*, 63 N. H. 618; *Yeamans v. James*, 27 Kan. 195.

The principles above stated as applicable to attorney and client apply with equal force to all transactions between principal and agent: *Condit v. Blackwell*, 22 N. J. Eq. 481; *Moore v. Mandlebaum*, 8 Mich. 432; *Newcomb v. Brooks*, 16 W. Va. 32.

From the confidential relations which exist between husband and wife, a presumption of undue influence arises in relation to any transfer of property between them, and in order to sustain a conveyance or gift by the wife to

the husband, the burden of proof is upon him to show that the transaction was freely and deliberately made, and that it was fair and proper: *Boyd v. De la Montagne*, 73 N. Y. 498; *Farmer v. Farmer*, 30 N. J. Eq. 211.

The relations between brother and sister may be of such reciprocal affection and confidence as to cast upon him the burden of proof to show the exact fairness of a transaction between them by which he is benefited: *Gillespie v. Holland*, 40 Ark. 28.

A relation of trust and confidence exists between a spiritualistic medium and a believer in his alleged powers, so peculiar that where an advantage is gained through a contract by the former against the latter, a presumption of undue influence arises against the medium, which casts the burden of proof upon him to show that the contract was obtained by perfectly fair means and free from any undue influence whatever: *Connor v. Stanley*, 73 Cal. 556; 1 Am. St. Rep. 84, and note; *Leighton v. Orr*, 44 Iowa, 679.

Where a person living in illicit sexual relations with another transfers to such person valuable property, especially when the donor in making the gift excludes natural objects of his bounty, the transaction will be viewed with the utmost suspicion, and the burden of proof rests on the donee to show that the transaction was the result of free volition, and not superinduced by undue influence: *Shipman v. Furniss*, 69 Ala. 556; *Leighton v. Orr*, 44 Iowa, 679.

A gift by an aged, weak, and infirm patient to his or her physician raises a presumption of undue influence which the physician must rebut, in order to uphold the transaction: *Cadwallader v. West*, 48 Mo. 483; *Woodbury v. Woodbury*, 141 Mass. 329; 55 Am. Rep. 479, and note. Although a contrary opinion is expressed in *Audenreid's Appeal*, 89 Pa. St. 114, 33 Am. Rep. 731, this case is against the decided weight of authority, as shown by the note thereto, 33 Am. Rep. 736, and the cases cited *supra*.

The principles which govern the dealings of one standing in a confidential or fiduciary relation apply to persons who clothe themselves with a character which brings them within the range of the principle: *Reed v. Peterson*, 91 Ill. 283. The rule is not limited to cases arising out of the relations which have been mentioned above, but applies in every case where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding. In all such cases a presumption of undue influence is implied, and the burden of proof is upon the person taking securities or contracts inuring to his benefit to show that the transaction is just and fair: *Fisher v. Bishop*, 108 N. Y. 25. Thus where one stands in relations of trust and confidence with another who is old and failing in mind, the law will presume a contract between them to have been the result of undue influence emanating from the stronger party: *Cadwallader v. West*, 48 Mo. 483. So one who has obtained from a woman who is old and feeble in intellect, and who has put herself in his power in a transaction which particularly concerns his interests, a mortgage as security for the debt of another, without the knowledge of her family, is compelled to show, in support of the mortgage, that the woman fully understood what she was doing, and that he had not abused the confidence thus reposed in him: *Wartenberg v. Spiegel*, 31 Mich. 400. And where an aged and infirm woman, a few days before her death, which resulted from an accident, conveyed the most of her property to a young man, who stood in the relation of an adopted son to her, and in whom she trusted, thus disinheriting her legal heirs, with whom she was friendly, and who were kept in ignorance of the transfer, the presumption of undue influence arises, and the burden of proof is upon the grantee to rebut the presumption: *Davis v. Dean*, 66 Wis. 101.

Where a young man shortly after becoming of age conveyed his property for a grossly inadequate sum, while so ill that it was not believed that he could recover, to a woman who had been a member of the household since the grantor was four months old, who had always been his nurse, instructor, and manager of his property, and in whom he confided, the burden of proof is upon the grantee to show that the transaction was fair and honest, and that the deed was not procured by undue influence: *Worrell's Appeal*, 120 Pa. St. 348. A conveyance by a nephew, a simple, ignorant, young man, to his uncle, an attorney at law, for an inadequate consideration, is presumptively obtained by undue influence: *Hall v. Perkins*, 3 Wend. 626. In *Presley v. Kemp*, 16 S. C. 234, 42 Am. Rep. 635, it was held, however, that a voluntary conveyance by an aged, feeble, and unmarried woman of her property which she had previously willed to charities, to a young unmarried man, twelve days before her death, in whose family she was living and to whom she was strongly attached, and who had acted as her agent, is not presumptively void as having been obtained through undue influence.

Generally, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, intoxication, or any other cause, although not amounting to absolute disqualification, and an inadequate consideration, imposition or undue influence will be presumed: *Moore v. Moore*, 56 Cal. 89; *Allore v. Jewell*, 94 U. S. 506; *Fishburne v. Ferguson*, 84 Va. 87. So when a note is taken from an habitual drunkard of weak intellect, the burden of proof is upon the person taking it to show a fair case, good consideration, and lack of undue influence: *Hale v. Brown*, 11 Ala. 87. When a person who is imbecile from habitual intoxication executes a voluntary and absolute deed of gift of all his property to his cousin, to the exclusion of his half-sisters, a presumption of undue influence arises, which must be rebutted by clear proof by the grantee before the deed will be allowed to stand: *Samuel v. Marshall*, 3 Leigh, 567.

SMITHWICK v. HALL AND UPSON COMPANY.

[30 CONNECTICUT, 261.]

NEGLIGENCE PRESUPPOSES A DUTY OF TAKING CARE, and this, in turn, presupposes knowledge or its legal equivalent.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — DANGEROUS POSITION. — A servant by changing his position at work, contrary to orders and after a warning of danger, voluntarily takes the risks of all perils which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the master's negligence from other sources, dangers which the servant was not bound to anticipate, and of whose existence he had no knowledge, he takes no risk and assumes no duty of taking care; and if injury results to him from such dangers, he is not guilty of contributory negligence.

CONTRIBUTORY NEGLIGENCE, WHAT CONSTITUTES. — An act or omission of a party injured, to amount to contributory negligence, must be negligent, and in the production of the injury, it must operate as a proximate cause or one of the proximate causes, and not merely as a condition.

MASTER AND SERVANT — RISK ASSUMED. — Where a servant has full knowledge of, and is abundantly cautioned against certain sources of, danger, and voluntarily neglects such warnings, and takes the risk of such per-

ills and dangers, and is then injured through the negligence of the master, from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the master to warn him, his failure to heed the warning given does not constitute contributory negligence as to the injury received.

CONTRIBUTORY NEGLIGENCE, WHAT CONSTITUTES. — An act or omission must contribute to the happening of the act or event causing the injury, to constitute contributory negligence; and if the act or omission merely increases or adds to the extent of the loss or injury, it will not have that effect, though it may affect the amount of damages to be recovered.

J. O'Neill and G. H. Cowell, for the plaintiff.

G. E. Terry, for the defendants.

TORRANCE, J. The general question reserved for our advice in this case is, whether the plaintiff, upon the facts, found is entitled to the substantial damages, or only to the nominal damages found by the court below.

Inasmuch as that court has expressly found that the negligence of the defendant caused or contributed to the injury for which the plaintiff seeks to recover, the decision of the above general question depends upon this single point, namely, whether the acts and conduct of the plaintiff as set forth upon the record constitute or amount to such contributory negligence on his part as will bar his right to substantial damages. The facts found, so far as they bear upon the question for decision, are, in substance, the following:—

The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood upon a platform about five feet wide and seventeen feet long, raised fifteen feet above the ground, and extending from the west side of the building easterly to a point about two feet east of the door or aperture through which the ice was taken into the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door, and served as a protective railing or guard to that portion of the platform. In front of the door, and east of it the platform was without guard or railing of any kind. A short time prior to the injury, the foreman of the defendant stationed the plaintiff on the platform just west of the door and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand

there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform and the liability by inadvertence to mistep or fall or slip off, the latter being aggravated by the liability of the platform to become slippery from broken ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation.

After the foreman went away, the plaintiff, in spite of the orders so given to him, and for reasons of his own apparently, went over to the east end of the platform and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow-workmen, seeing the plaintiff in that place, told him that "it was not safe, and to stand on the other side"; but the plaintiff, notwithstanding such warning, remained at work there.

While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform, and thence to the ground. The plaintiff was struck by portions of the descending mass, and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse. Most of the injuries which he actually sustained were occasioned by the fall.

The plaintiff had no knowledge that the wall would be likely to fall or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard."

In contemplation of the peril from the falling wall, it is found that "the spot where the plaintiff stood could not have been considered more dangerous than the place where he was directed to stand, though in fact most of the brick fell upon the side where he stood, and the result demonstrated, therefore, that the other side would have been safer in the event which occurred."

Upon these facts the defendant contends that the plaintiff, in going to and remaining on the east end of the platform, contrary to the orders and in spite of the warning given him, and in view of the obvious and manifest danger in so doing, was guilty of such contributory negligence as bars him of his right to recover more than nominal damages.

If the plaintiff's injuries had resulted from any of the perils

and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow-workman warned him, then this claim of the defendant would be a valid one. But, upon the facts found, it is without foundation.

The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe, and would not be likely to fall upon him, no matter where he stood on the platform. He had no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this, in turn, presupposes knowledge, or its legal equivalent.

With respect to that danger, the plaintiff, upon the facts found, must be held to have acted as any reasonably careful man would have acted under the same circumstances. In changing his position contrary to orders, he voluntarily took the risk of all perils and dangers which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the defendant's negligence from other sources,—dangers which he was not bound to anticipate, and of whose existence he had no knowledge,—he took no risk, and assumed no duty of taking care. It was the duty of the defendant, on the facts found, to warn the plaintiff against the danger from the falling wall.

Now, the act or omission of a party injured which amounts to what is called contributory negligence must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause, or one of the proximate causes, and not merely as a condition.

In the case at bar the conduct of the plaintiff, as we have seen, was, with respect to the danger from the falling wall, not negligent for the want of knowledge or its equivalent on the part of the plaintiff.

Nor was his conduct, legally considered, a cause of the injury. It was a condition rather.

If he had not changed his position he might not have been hurt. And so, too, if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth or his not remaining at home that day can in any just or legal sense be deemed a cause of the injury.

The court below has found that the plaintiff's fall in the position in which he stood was due to the giving way of the wall, and that most of his injuries were occasioned by the fall. His position there, upon the facts found, can no more be considered as a cause of the injury, than it could be in a case where the defendant, in doing some act near the platform without the plaintiff's knowledge, had negligently knocked him to the ground, or had negligently hit him with a stone. Had the injury been occasioned by a misstep or slip from the platform by the carelessness of the plaintiff, or for the want of a railing, the causal connection between the change of position and the injury would, legally speaking, be quite obvious; but from a legal point of view no such connection exists between the change of position and the giving way of the wall.

The plaintiff had full knowledge of and was abundantly cautioned against certain particular sources of peril and danger, and he voluntarily neglected the warnings and took the risk of those perils and dangers. He was injured through the negligence of the defendant from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the defendant to warn him.

Under these circumstances, the failure or neglect to heed the warning does not constitute contributory negligence: *Gray v. Scott*, 66 Pa. St. 345; 5 Am. Rep. 871.

In the case cited, certain boys had been warned not to play at a certain point, because of some particular and obvious dangers existing there. They failed to heed the warning, and one of them, playing at that place, was killed. His death was caused by the negligence of another, and came from a source of danger not obvious, and entirely different from any the boys had been warned against.

In answering the argument that the boy's failure to heed the warnings was a cause of his death, and contributory negligence, the court say: "But because he was under the tramway in the passage below it is thought he was guilty of contributory negligence. He could not be guilty of negli-

gence as to the defendant without there was some reason to expect danger and a duty of care on his part in relation to it. There was, ordinarily, none. He had a right, therefore, to suppose everything secure and safely managed on the tramway; and because it was not, he was killed. Precisely the same argument could have been used if the boy had been killed in that place by the negligent use of fire-arms discharged a hundred yards off."

The defendant seems to claim, however, that although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall; and that as he probably would not have fallen had he remained behind the railing, he contributed to his injury by placing himself where, in case of such accident, there was nothing to prevent his fall.

Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not must forever remain matter of conjecture. But if its truth could be demonstrated, it would not, as we have seen, change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal stand-point, a contributing cause, when it was but a condition.

And if the claim means that the plaintiff, by his act, increased the injury merely, then if this were true, it would not be such contributory negligence as would defeat the action. To have that effect, it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though, of course, it may affect the amount of damages recovered in a given case: *Gould v. McKenna*, 86 Pa. St. 297; 27 Am. Rep. 705; *Stebbins v. Central Vt. R. R. Co.*, 54 Vt. 464; 41 Am. Rep. 855. This claim, however, on the facts found, is wholly without foundation.

The plaintiff is entitled to judgment in his favor for one thousand dollars, and the superior court is so advised.

NEGLIGENCE, DEFINITION OF. — That an action for negligence may be maintained, it must appear that there existed some duty on the part of the defendant towards the plaintiff which was unfulfilled: *Trask v. Shotwell*, 41 Minn. 66; *Schmidt v. Bauer*, 80 Cal. 566; *Osborne v. McMasters*, 40 Minn. 102; 12 Am. St. Rep. 696, and note 700, 701; *Corniff v. Blanchard etc. Co.*, 66 Mich. 638; 11 Am. St. Rep. 541, and note.

CONTRIBUTORY NEGLIGENCE, WHAT CONSTITUTES. — Where danger is known, and can be easily avoided, peril voluntarily and unnecessarily as-

sumed may constitute contributory negligence: *Harris v. Township of Otton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note 850, 851; *Shelley v. Austin*, 74 Tex. 609; for every one is required to exercise ordinary care: *Moberly v. Kansas City etc. R. R. Co.*, 98 Mo. 183. The absence of an exercise of ordinary care is a question of fact for the jury: *Carver v. Plank Road Co.*, 69 Mich. 616.

CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE. — Contributory negligence cannot be invoked as a defense unless it is a proximate cause: *North Birmingham etc. R'y Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105, *Dickson v. Hollister*, 123 Pa. St. 421; 10 Am. St. Rep. 533, and note; *Smith v. Irwin*, 51 N. J. L. 507; 14 Am. St. Rep. 699.

MASTER AND SERVANT — RISKS ASSUMED BY SERVANT. — A servant entering the service of his master assumes the risk of such perils as are incident to the particular employment in which he engages: *Steffen v. Mayer*, 96 Mo. 420; *Mick v. Flint etc. R. R. Co.*, 67 Mich. 632; *Roth v. Northern P. L. Co.*, 18 Or. 205; *Rummel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827, and note. A servant voluntarily undertaking the risk of an obvious danger cannot recover for injuries occasioned therefrom, even though he exercised due care: *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362; *Coal Run Co. v. Jones*, 127 Ill. 379. The servant must use ordinary care to avoid injury: *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 589; *Clough v. Hoffman*, 132 Pa. St. 626; 19 Am. St. Rep. 620, and note. But if the master has, by his own act, thrown the servant off his guard, inducing him to believe that no vigilance is required, then the want of vigilance on the part of the servant will not bar a recovery for injuries sustained: *Kinney v. Folkerts*, 78 Mich. 688.

DANGEROUS MACHINERY — RISKS. — The danger resulting from negligence is not one of the ordinary risks of operating dangerous machinery: *Brown v. Sullivan*, 71 Tex. 470.

STANTON v. NEW YORK AND EASTERN RAILWAY COMPANY.

[39 CONNECTICUT, 272.]

NOMINAL DAMAGES MEAN NO DAMAGES AT ALL. — They exist only in name, and not in amount, and should only be awarded where there has been a breach of contract, and no actual damages whatever have been or can be shown.

DAMAGES FOR BREACH OF CONTRACT. — One who violates his contract with another is liable for all the direct and proximate damages which result from such violation, and the party who is prevented from performing his contract by such violation is entitled to recover the value thereof.

CORPORATIONS — CONTRACT BY PROMOTERS — RATIFICATION. — A contract made by the promoters of a corporation to aid the inchoate corporation, as a reasonable means for carrying out its authorized purposes, and afterwards ratified by the corporation, makes it liable for everything which has been done under the contract. Such ratification relates back to the execution of the contract, and renders it obligatory from the outset.

CORPORATIONS — CONTRACT BY PROMOTERS — RATIFICATION. — A corporation has power, when organized, to ratify a contract made by its pro-

motors, when it is one within the purposes for which the corporation was organized, and is a reasonable means of carrying out those purposes, and the ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into; nor can the corporation in such case take advantage of its own acts or omissions to escape liability on the contract.

CONTRACTS, PAROL EVIDENCE TO VARY. — Where a contract is in writing, and specially exempts one of the parties from the performance of certain duties, parol evidence is inadmissible to show a parol agreement inconsistent with the written one.

S. Tweedy and J. S. Seymour, for the appellant.

J. B. Hurlbutt, for the appellees.

ANDREWS, C. J. The New York and Eastern Railway Company was a railroad corporation organized under the general railroad law of this state for the purpose of building and operating a railroad from the western line of the state, in the town of Greenwich to the town of New Haven, a distance of forty-six miles, and included a bridge across the Housatonic River.

At the March term, 1875, of the superior court in Fairfield County, upon the application of Daniel N. Stanton and others, Levi Warner, Esq., was duly appointed receiver of all the property and assets of this corporation. Mr. Warner accepted the trust, and gave bond as required by the decree of the court. At the same term of the court it was ordered that all persons having claims against the corporation should present them to the receiver within ninety days after the publication of the order. Among others, Henry Hungerford of Norwalk presented to the receiver in due time a claim against the corporation, amounting to two hundred thousand dollars. At a later term of the court such proceedings were had that Julius B. Curtis, Esq., was appointed a committee of the court to examine and adjust all the claims so presented to the receiver and not allowed by him, and to make report to the court of his doings in the premises. Mr. Hungerford appeared before the committee, and offered testimony in support of his claim. Various proceedings were had in court and before the committee from time to time, and the committee returned his completed report to the court in June, 1889. Thereupon Mr. Hungerford came into court and remonstrated against its acceptance. The court overruled the remonstrance, accepted the report, and rendered judgment pursuant thereto. Mr. Hungerford now brings the case to this court by appeal. For a clear under-

standing of the questions raised by the appeal, a somewhat more extended statement is required.

On the twelfth day of September, 1873, Henry Hungerford entered into a contract with Samuel E. Olmstead, William C. Street, William T. Minor, and Henry R. Parrott, as follows:—

“Whereas, the New York and Eastern Railway Company are desirous of procuring lands for the right of way, for depots side-tracks, gravel-pits, and other necessary purposes for their railroad, as called for by the terms of the contract between said railway company and D. N. Stanton and A. P. Balch, and within the limits herein provided,—the assent of the said Stanton and Balch in writing having been obtained thereto,—from the line of the state of New York to the western line of the city of New Haven, and from Stratford to Derby;

“Now, therefore, for that purpose, the following memorandum of agreement is this day entered into, by and between Samuel E. Olmstead, William C. Street, William T. Minor, and Henry R. Parrott, a committee of the directors of the said railway company duly authorized thereto, the party of the first part, and Henry Hungerford of Norwalk, Connecticut, party of the second part:—

“The party of the first part, for all the lands necessary for the above purposes, on the line of their said railroad between the western line of the state of Connecticut, in the town of Greenwich, and the western line of the city of New Haven, and for all expenses for procuring the same except engineering, which shall be paid by the party of the first part, agrees to give the party of the second part five hundred thousand dollars of the capital stock of the said railway company, fully paid up.

“The said party of the second part will at once, as soon as the engineer has located any part of the line of said railroad, proceed to purchase and procure all such necessary lands on said line at his own charge and expense, and within a reasonable time, and as fast as required by said company, will cause such lands to be conveyed to said railway company, or to be taken under the statute laws of the state, that said company may enter thereon and construct their road.

“The engineer shall lay out such additional lines as may be indicated and required by said party of the second part, subject to the approval of the said company, and of the said Stanton and Balch, to enable him to make the most advantageous

terms in purchasing said lands for the building of the said road on the most feasible and direct route, as provided by said contract.

"It is mutually agreed and understood that the party of the second part shall commence at once to procure said lands on such portions of said route as may be required by the party of the first part, and located by said engineer, and as soon as and when he shall cause to be conveyed to said company, or shall procure under the statute the said lands or any portion thereof, then the party of the first part shall pay to the party of the second part or assigns, according to said engineer's estimate per mile for the property conveyed, compared with his gross estimate, in relative proportion to the sum of five hundred thousand dollars; and when all of said lands are so conveyed and procured, then the remaining portion, if any, of said five hundred thousand dollars capital stock, fully paid up, shall be paid to the party of the second part or assigns. If said five hundred thousand dollars of capital stock shall be insufficient to purchase and procure said lands, then any additional amount to be used for such purpose shall be a matter of further agreement.

"Nothing in this agreement shall be so construed as to hold the said party of the second part liable in any way for procuring charters for drawbridges over navigable waters.

"It is further mutually agreed between the parties hereto that if any portion of the said right of way between the aforesaid boundaries shall not be taken by said company, then so much of said five hundred thousand dollars as shall be a fair relative proportion of the estimated cost of said right of way, depot-grounds, etc., not taken, shall be withheld by the party of the first part in the final settlement between the parties hereto; and the party of the second part shall have no claim of any kind against said company for time or expenses in so purchasing or procuring said right of way, and that no part of said five hundred thousand dollars of stock or its proceeds shall be used to pay for such time or expenses, except any balance that may be left after purchasing and procuring said lands.

"In case any disagreement should arise between said parties hereto in regard to any matter provided for, or pertaining to this memorandum of agreement, such disagreement or difference shall be submitted to the arbitration of three disinterested persons, either agreed on by the parties or one appointed by

each party; and the decision of such arbitrators shall be final and conclusive on the parties to this agreement.

"In witness whereof the parties hereto by their own proper hands and seals have signed this memorandum agreement, this twelfth day of September, one thousand eight hundred and seventy-three.

"S. E. OLNSTEAD. [L. s.]

"WM. C. STREET. [L. s.]

"H. R. PARROTT. [L. s.]

"WM. T. MINOR. [L. s.]

"HENRY HUNGERFORD." [L. s.]

At that time there was no legally incorporated New York and Eastern Railway Company. There was a voluntary association of individuals calling itself by that name and which was the preliminary organization formed for the purpose of promoting and procuring the complete incorporation of the company. Of this voluntary association the Messrs. Olmstead, Street, Minor, and Parrott were the officers and directors. Mr. Hungerford commenced at once the performance of the contract on his part, and obtained contracts from many of the owners of land along the line of the proposed railroad, and expended in such work, as he claimed, much time and a large amount of money. On the tenth day of February, 1874, the company became duly and legally incorporated by filing with the secretary of the state its articles of incorporation as provided by the statute. Mr. Olmstead was made the president of the corporation, as he had been of the preliminary organization, and Messrs. Street, Minor, and Parrott were made directors. On the twenty-seventh day of April, 1874, the corporation, by a duly authorized committee of its directors, consisting of the Messrs. Olmstead, Street, Minor, and Parrott, ratified and declared in writing the contract of the twelfth day of September, 1873 (except that part that had reference to the line of road between the towns of Stratford and Derby) to be a binding contract between Mr. Hungerford and the corporation. The ratification was annexed to the contract, and is as follows:—

"The New York and Eastern Railway Company having been, since the execution of the foregoing contract, duly and legally organized, and the committee named herein having been appointed by the directors of said company, and duly authorized to make this agreement, it is hereby agreed, by and between the said committee and said Henry Hungerford, that the foregoing contract is ratified, and declared to be a

binding contract upon the parties, except as to that part of the same which provides for the procuring of land for the right of way from Stratford to Derby, which is not to be procured by said Hungerford. The amount, for that reason, to be deducted from the compensation of five hundred thousand dollars, in the paid-up capital stock of said company, to be paid to said Hungerford or his assigns, is to be a matter of further negotiation and settlement between the parties; and if they cannot agree, it is to be fixed upon in the same manner as agreed in said contract for the settlement of any differences or disagreements that may arise between the parties."

The corporation preferred its petition to the general assembly at the May session, 1874, praying for liberty to erect a railroad bridge across the Housatonic River as a part of its line, but the petition was dismissed, and liberty to build the bridge was denied.

After the company became duly incorporated, Mr. Hungerford continued in the business of procuring contracts from other owners of land, and renewals of those contracts which had been previously made; and he claimed that he had obtained the right of way for more than fifteen miles of the distance of the line in such way that it was ready to be conveyed to the corporation. He claimed to have proved that in and about the obtaining of these contracts he spent more than seven months in actual days' work, with an assistant for the whole time, and paid out more than six thousand dollars in cash in the necessary disbursements of the work; and that by reason of the acts and omissions of the company he was prevented from engaging in any other business or occupation from the date of the contract until February 10, 1875. He claimed also that it would not have cost him more than one hundred thousand dollars to have procured the entire right of way called for by the contract. For the purposes of the present discussion, it must be taken that the several claims were proved, and are true, as they are admitted by the demurrers to the remonstrance.

At the hearing before the committee, Mr. Hungerford claimed that, upon the facts of the case, he was entitled to damages. 1. That for breach of contract, by reason of the acts and omissions of the corporation, there should be allowed to him as damages a sum equal to the par value in money of the five hundred thousand dollars of capital stock of the corporation, less the sums it would have cost him to procure the right of

way; or 2. That there should be awarded to him such a proportionate part of the par value, in money, of the five hundred thousand dollars of capital stock, less the cost of purchasing, as the part of the line which he had procured bore to the whole line; or 3. That there should be awarded to him a sum equal to the fair value of the services and work he and those under him had performed, and also a sum equal to all the money he had disbursed, and such further substantial damages as he was legally and equitably entitled to for the breach of the contract. The committee overruled each of these claims, and refused to allow any substantial damages as claimed by Mr. Hungerford, and allowed nominal damages only. The ruling and decision of the committee on these claims is the fourth ground of remonstrance. A demurrer to this ground of remonstrance was sustained. This is assigned for error in the reasons of appeal, and presents the main question in the case.

Nominal damages mean no damage at all. They exist only in name, and not in amount. In the quaint language of an old writer, they are "a mere peg to hang costs on." They are such as are to be awarded in a case where there has been a breach of a contract and no actual damages whatever have been or can be shown. The facts in connection with the claim of Mr. Hungerford, as found or as admitted by the pleadings, are such as, under most circumstances, would seem to require that more than nominal damages should be allowed. They show that Mr. Hungerford was ready and willing at all times, and able, to perform the contract fully on his part, and that he would have done so except that he was prevented from so doing, and so was prevented from earning the whole sum of five hundred thousand dollars in the fully paid-up capital stock of the corporation, by the acts and omissions and inability of the company.

It is a general rule of law that one who violates his contract with another is liable for all the direct and proximate damages which result from such violation. It is a rule so obviously just and so well established by authority that it ought not to be called in question. It is also a rule of law that "in all cases of prevention of performance, where the plaintiff has been deprived by the defendant of the benefit of the contract, the plaintiff is entitled to recover what he has lost by the act of the defendant": Addison on Contracts, 881. See also Chitty on Contracts, 11th ed., 1823, note b; 1 Sedgwick on Damages, 7th ed., 473. In *Wells v. Abernethy*, 5 Conn. 227,

this court laid down the same rule. Judge Homer, in giving the opinion, said: "If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing he contracted to do. . . . When a contract has been violated, the compensation of the party complaining of the violation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value": *Walsman v. Wheeler and Wilson Mfg. Co.*, 101 N. Y. 211; 54 Am. Rep. 676.

In *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415, Judge Woodruff, in the decision, said: "The only rule that will do justice to the parties is, that the plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it, he must incur expense, submit to labor, and the appropriation of his stock. His damages are what he has lost by being deprived of his chance of profit." See also *Brooks v. Hubbard*, 3 Conn. 58; 8 Am. Dec. 154; *Dennis v. Maxfield*, 10 Allen, 138; *Chamberlin v. Scott*, 23 Vt. 80; *Stevens v. Lyford*, 7 N. H. 360, 365; *Mitchell v. Gile*, 12 N. H. 395; *Smith v. Smith*, 2 Johns. 235, 243; 3 Am. Dec. 410; *Gleason v. Pinney*, 5 Cow. 152; *Planche v. Colburn*, 5 Car. & P. 58; *Inebald v. Western Coffee Plantation Co.*, 17 Com. B., N. S., 738. Many other authorities are cited in the notes to *Cutter v. Powell*, 2 Smith's Lead. Cas., 7th ed., 53.

The committee, in one part of his report, says: "I do not find that from the twenty-seventh day of April, 1874 (the date of the ratification), the said Hungerford suffered any special loss or damage from the acts, omissions, and inability of said corporation; and as he makes no special claim for damages from the time of the ratification of the contract until the failure of said corporation to obtain a grant to build said bridge, at which time it became apparent that the company could not carry into effect the provisions of their contract with him, I find that he necessarily suffered but little loss or damage after that time, and therefore find that he is entitled to nominal damages." In another place he says: "I do not find said ratification of said contract in terms to be a ratification of the acts and doings of Mr. Hungerford in procuring said contracts from individuals for the right of way, nor do I find that the New York and Eastern Railway Company ever ratified said contracts in any other manner." It is evident from these ex-

tracts from his report that the learned committee was of the opinion that in estimating damages no regard whatever was to be paid to the contracts which Mr. Hungerford had obtained prior to the ratification by the corporation of its contract with him. In this respect, we think he failed to give the full and proper effect to the ratification.

The corporation, by its ratification of the contract previously made by its promoters, became liable for everything that had been done pursuant to it. That contract was made by the promoters to aid the inchoate corporation, and it was a reasonable means for the carrying out of the authorized purposes of the company. It required Mr. Hungerford to commence at once to procure land. He did so commence, using forms of contracts provided by Mr. Olmstead, the president. The directors acted with full knowledge of all the facts, and with such knowledge they "ratified" the contract. That word itself means the adoption of a previously formed contract. Ratification relates back to the execution of the contract, and renders it obligatory from the outset. By the nature of the act the party ratifying becomes a party to the contract, and is, on the one hand, entitled to all its benefits, and on the other, is bound by its terms: *Edwards v. Grand Junction R'y Co.*, 1 Mylne & C. 650, 672; *Negley v. Lindsay*, 67 Pa. St. 217; 5 Am. Rep. 427 (Sharswood, J.); *Anderson's Law Dict.*, in verbum; *Low v. Connecticut and Passumpsic Rivers R.R. Co.*, 45 N. H. 370; *Stanley v. Chester and Birkenhead R'y Co.*, 3 Mylne & C. 778. A corporation has power, when fully organized, to ratify a contract made by its promoters, when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes: *Morawetz on Corporations*, 549; *Touche v. Metropolitan Warehousing Co.*, L. R. 8 Ch. App. 671. And the ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into: *Whitney v. Wymon*, 101 U. S. 397; *Angell and Ames on Corporations*, sec. 304; *Church v. Sterling*, 16 Conn. 388; *Fleckner v. Bank of U. S.*, 8 Wheat. 383 (Story, J.).

The fifth ground of remonstrance states that for the purpose of showing that Mr. Hungerford was entitled to no damage, even if the contract had been broken by the company, the company introduced Mr. H. R. Parrott, one of its directors and its secretary, as a witness, of whom it asked: "Was it practicable or possible to obtain subscriptions for the road

after the legislature refused to give you a charter for the bridge?" To this question Mr. Parrott answered: "It was utterly impossible to get subscriptions to stock or to raise money to build the road." This question and answer were admitted against the objection of Mr. Hungerford. The bearing and effect of this testimony is made clear by that portion of the committee's report where he finds, "that said company did not . . . cause their road to be laid out and accepted by the railroad commissioners; that they did not lay out and expend a sufficient sum as required by statute to enable them to continue their corporate existence; and that they suffered their corporate rights to expire, in consequence thereof, on the tenth day of February, 1875. Nor did they issue any stock certificates, although a small portion of stock had been subscribed for by individuals, which stock has never had any market value, and no value whatever except as assets in the hands of the receiver to pay the past liabilities of said railroad company."

We think the admission of this evidence was error. It was allowing the corporation to take advantage of its own acts and omissions, to escape liability on its own contract. The statute under which the corporation was organized required that before the certificate of its organization was filed there must be *bona fide* subscriptions to its stock, of at least five thousand dollars for each mile of its proposed line,—in this instance forty-six miles,—so that this railroad corporation must have had at least two hundred and thirty thousand dollars of *bona fide* subscriptions to its capital stock for which it could have issued certificates, and which must have been worth their full face value. How much more stock had been subscribed for by individuals does not appear. That no stock was issued was because the corporation decided not to issue any, and that is the best possible reason why it never had any market value. As none was issued, clearly it could never have had any market value, and no value whatever except as assets in the hands of the receiver to pay the past liabilities of the corporation.

The corporation was organized for the purpose of building and operating a railroad from Greenwich to New Haven,—presumably for the profit of its corporators and promoters. It may be conceded that the success of the scheme depended largely upon obtaining permission to bridge the Housatonic River. It may be granted further that, having failed to ob-

tain such permission, the directors acted prudently, so far as their enterprise was concerned, in permitting their corporate existence to expire. But neither of these considerations could absolve the corporation from its contract. It had stipulated with Mr. Hungerford to pay him five hundred thousand dollars in the fully paid up shares of its capital stock. It could not, without violating that contract, permit its corporate existence to expire, or omit to issue its stock. The permitting itself to become disabled from performing the contract on its part was a violation of the agreement with Mr. Hungerford. When a party enters into an agreement which can only take effect by the continuance of a certain existing state of things, there is an implied engagement on his part that he will not, by any act or omission of his own, do anything to put an end to that state of circumstances under which alone the agreement can be operative: *Stirling v. Maitland*, 5 Beat & S. 840. The case of *Inchbald v. Western Coffee Plantation Co.*, 17 Com. B., N. S., 783, is clearly in point. The plaintiff was a broker, and sued to recover the sum of four hundred pounds sterling. The defendant was a stock company formed to carry on the business of raising coffee, tea, and cinchona, and had entered into negotiations with one Lascelles to purchase of him a plantation in the East Indies on which to carry on the business. The defendant then agreed with the plaintiff to pay him one hundred pounds down and four hundred pounds afterwards, when all the shares of the defendant should be placed; and in consideration thereof, the plaintiff undertook to place all the shares of its stock. The plaintiff procured some shares to be subscribed for, but before he had procured the whole, Mr. Lascelles refused to convey the plantation to the defendant. Thereupon the defendant's directors decided to abandon the enterprise, wound up the corporation, and returned to the stockholders who had subscribed the deposits they had paid. It was held that although the scheme of the defendant was rendered impracticable by the refusal of Mr. Lascelles to convey the plantation, yet as the winding up of the corporation was the voluntary act of the defendant, and as thereby they had prevented the plaintiff from earning the whole four hundred pounds, they were liable to him for that amount, less the risk he had; and the court assessed the damages at two hundred pounds. See also 2 Parsons on Contracts, 5th ed., 523; Chitty on Contracts, 11th ed., 89, 1059;

Planché v. Colburn, 5 Car. & P. 58; *McIntyre v. Belcher*, 14 Com. B., N. S., 658.

The sixth ground of remonstrance is, that "on the hearing, said company, for the purpose of showing that the performance of said Hungerford's contract depended upon said company's obtaining the right to bridge the Housatonic River, and that in the event of a failure to obtain such right said contract was to be terminated, asked said Parrott: 'Did Mr. Hungerford know that the success of the road depended upon getting the bridge?' In answer, the witness said: 'I say Mr. Hungerford knew that the success of the road depended upon getting the bridge, because I talked with him on that very subject over and over again.' Mr. Hungerford duly objected to this evidence."

We think it was error to admit this testimony. The contract between Mr. Hungerford and the company was in writing, and all parol understandings and agreements were merged in it. Besides, the contract expressly exempted Mr. Hungerford from liability for procuring charters for drawbridges over navigable waters.

For the reasons here given, we think the superior court erred in accepting the report of the committee.

BREACH OF CONTRACT—MEASURE OF DAMAGES.—As to what damages may be recovered for the breach of a contract, see *Masterton v. Mayor*, 7 Hill, 61; 42 Am. Dec. 38, and particularly note 48-51. Damages recoverable for the breach of a contract must be the natural and proximate consequences of such breach: *Ashe v. De Rosset*, 5 Jones, 299; 72 Am. Dec. 552, and note; *Indiana etc. R'y Co. v. Adamson*, 114 Ind. 282; *Hove v. North*, 69 Mich. 272; *Morris v. Colburn*, 71 Tex. 406; *Dunn v. Mackey*, 80 Cal. 104; *Liljengren etc. Co. v. Mead*, 42 Minn. 420; the amount of which is measured by the actual damage resulting to the injured party from the failure of the other to perform his agreement: *Clements v. Beatty*, 87 Ala. 238 (where there was a breach on the part of a vendor in a contract for the sale of trees); *Berkey v. Hascall*, 123 Ind. 502 (where the breach was on the part of a furniture company in failing to deliver furniture by a stipulated date); *Swanman v. Clark*, 120 Ind. 142 (where the breach was of a contract to saw lumber); *Cameron v. White*, 74 Wis. 425 (where the breach was by the vendee in a contract to sell and deliver sawed lumber); *Phelps v. Beebe*, 71 Mich. 554; *Wells v. Board of Education*, 78 Mich. 261 (where the breach was that of a contractor in failing to complete a building); *Orescent Mfg. Co. v. Nelson Mfg. Co.*, 100 Mo. 322 (where the breach was by defendant in failing to furnish plain wire to the plaintiff, who by the terms of the contract was to convert it into barbed wire).

Speculative damages are not recoverable for a breach of contract: *Outes v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806; *Young v. Curreton*, 87 Ala. 727; *Cohn v. Norton*, 57 Conn. 480; *Thorp v. Bradley*, 75 Iowa, 50; *Petrie v. Lana*, 67 Mich. 458.

The measure of damages may be governed by a stipulation as to amount mentioned in the contract itself: *Welch v. McDonald*, 85 Va. 500; *St. Paul F. Co. v. Weymann*, 40 Minn. 419; *Margale v. Lauretson*, 76 Iowa, 23.

But one who suffers from the breach of a contract must so act as to make his damages as small as he reasonably can: *Wright v. Bank*, 110 N. Y. 237; 6 Am. St. Rep. 356, and note 364, 365; note to *Snodgrass v. Reynolds*, 58 Am. Rep. 611; *Davis v. Fish*, 1 G. Greene, 406; 48 Am. Dec. 387, and note; *Larkin v. Hecksher*, 51 N. J. L. 133; *Dunn v. Day*, 78 Cal. 640.

CORPORATIONS — PROMOTERS. — For a discussion of the law relating to promoters of corporations, and their relations thereto, see *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149, and particularly extended note 161-168.

CONTRACTS IN WRITING — PAROL EVIDENCE TO CONTRADICT, VARY, OR EXPLAIN. — In the absence of fraud or mutual mistake, parol evidence is inadmissible to vary, contradict, add to, or explain a written agreement between two or more persons: *Bank v. McBlues*, 104 N. C. 305; *Lakeside L. Co. v. Dromgoole*, 89 Ala. 506; *Schneider v. Turner*, 130 Ill. 28; *Hunt v. Gray*, 76 Iowa, 268; *Chemical etc. Co. v. Howard*, 150 Mass. 496; *Simonds Mfg. Co. v. Riddle*, 73 Mich. 497; *Nichols v. Grandall*, 77 Mich. 401; *Monnett v. Monnett*, 46 Ohio St. 30. But where only a part of a contract, which is not by law required to be written, is in writing, parol evidence may be received to prove the part which is not in writing: *Bank v. McBlues*, 104 N. C. 305; *Routledge v. Worthington*, 119 N. Y. 592; *Bird v. Pope*, 73 Mich. 484; *Doty v. Thomas*, 116 N. Y. 515; *Alexander v. Thompson*, 42 Minn. 493. It is only in cases of latent ambiguity that parol evidence is admissible to explain a written contract: *Hubble v. Cole*, 85 Va. 87; *Dugfield v. Hus*, 129 Pa. St. 94; *McPhos v. Young*, 13 Col. 81; *Adams v. Morgan*, 150 Mass. 143. The actual consideration of a contract in writing may be shown by parol evidence: *Conant v. National etc. Bank*, 121 Ind. 323; and except for the purpose of impeaching or destroying the contract, parol evidence is admissible to show that the consideration was not paid or received as stated in the instrument of writing: *Pray v. Rhodes*, 42 Minn. 93. Extrinsic matters should be very reluctantly allowed to affect the terms of a written contract under any circumstances: *Lyon v. Tiffany*, 76 Mich. 158. Two written agreements entered into by and between the same parties with reference to the same subject-matter at the same time are to be construed together as one entire contract: *Bigelow v. Wilson*, 77 Iowa, 603; *Dexter v. Ohlander*, 89 Ala. 263; *Abele v. McGuigan*, 78 Mich. 416. But a contemporaneous oral agreement is not admissible to vary the construction of a written contract complete in itself: *Liljengren L. Co. v. Mead*, 42 Minn. 421.

It is settled, however, that parties to a written contract which by law is not required to be in writing may by mutual consent orally vary or entirely rescind their written contract: *Badders v. Davis*, 88 Ala. 367; *Lynch v. Henry*, 75 Wis. 631; *Douglas v. Union Mut. L. Ins. Co.*, 127 Ill. 101. Compare note to *Appeal of Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 893, 894.

LEMMON v. STRONG.

[30 CONNECTICUT, 422.]

NEGOTIABLE INSTRUMENTS — EQUITABLE ASSIGNMENT OF GUARANTY ON NOTE. — Where a note is payable on demand, and contains upon its face a written guaranty of payment by a third person and an assignment by the payee for value, such assignment will pass to the assignee the equitable interest of the assignor in the guaranty, in accordance with the manifest intention of the parties, it appearing that though nothing was said about the guaranty at the time of the assignment, it was practically all that gave the note any value, and that the paper was treated by all parties as one instrument for the security and payment of the note.

A. D. Warner and J. Huntington, for the appellant.

W. Cothren, for the appellee.

TORRANCE, J. The facts found by the court below, so far as a statement of them is necessary for the decision of the case, may be briefly stated as follows: In April, 1877, one **KARRMAN** borrowed of one **Sherman** four hundred dollars, and at the same time, and in consideration of the loan, made and delivered to **Sherman** a promissory note, of which the following is a copy: —

“WOODBURY, April 26, 1877.

“On demand, for value received, I promise to pay **B. A. Sherman** \$400 (four hundred dollars), with interest annually.

H. S. KARRMAN.”

When so delivered, the note had the following indorsement upon it, made and signed, in consideration of the loan, by the defendant, **Strong**: —

“I hereby warrant the within note good and collectible until paid.

W. W. STRONG.”

At this time **Karrman** had but little property, and it is found that the loan was made and the note accepted “upon the individual financial responsibility of the defendant, **Strong**, and upon his guaranty.”

Karrman regularly paid the annual interest upon the note to **Sherman** up to April, 1883. In January, 1884, **Sherman** demanded of him payment of the note, which being refused, he brought suit against him in February, 1884. While that suit was pending, **Sherman**, for the sum of three hundred dollars, paid to him by **Daniel S. Lemmon**, the plaintiffs' intestate, sold and assigned the note to **Lemmon** by a written indorsement, directly under the guaranty and signature of **Strong**, of which the following is a copy: —

"February 12, 1884. For value received, I hereby sell and assign this note to D. S. Lemmon. B. A. SHERMAN."

Thereupon Sherman withdrew from the suit. Lemmon was by order of court substituted as plaintiff, and he prosecuted the suit to final judgment, and took out execution against Karrman. Only a small sum, however, was realized upon the execution, and the present suit is brought to recover from the defendant the balance due upon the note.

In the court below, after the plaintiffs had rested their case, the defendant moved for a nonsuit, "on the ground that the plaintiffs had failed to prove that the contract of guaranty of the defendant, Strong, upon said note, had been assigned to the plaintiffs' intestate."

The court below, upon the point involved in this claim, in addition to the facts already stated, finds as follows: "The evidence bearing upon this point, and the intention of the parties, was the written assignment that appeared upon the note itself, signed by the said Sherman as aforesaid, the fact that the said Lemmon, at the time the note was purchased by him, made an examination of the same, and the fact that the note was not good and collectible as against Karrman, while the defendant, Strong, was a man of property, and in good financial standing. There was nothing said between the said Sherman and the said Lemmon, at the time of the assignment of the note as aforesaid, about the defendant, Strong."

The court below came to the conclusion, upon the facts found, that, in making the assignment to Lemmon, Sherman, under the circumstances, had assigned both the contract of Karrman and the contract of the defendant, and thereupon overruled the motion for a nonsuit, and rendered judgment for the plaintiffs. Whether the court erred in its conclusion is the principal question in the case.

The defendant argues that the contract of the defendant was a collateral undertaking, and not a security; that it was made with Sherman alone, as the first holder of the note for value, was not negotiable, and was attached to a non-negotiable note, and therefore that it did not pass to Lemmon unless it was specially assigned to him by Sherman, and that the transaction between Sherman and Lemmon, resulting in the delivery of the note to Lemmon, did not amount to such an assignment of the defendant's contract.

If we assume, for the sake of the argument, that the guaranty was a collateral undertaking, made with Sherman as the

first holder for value, we still think the plaintiffs are entitled to recover upon the facts found.

It is not claimed by the defendant that the contract of guaranty could not, under any circumstances, be either legally or equitably assigned by Sherman to Lemmon. The claim is, that, as matter of law on the facts found, the guaranty was not assigned legally or equitably, under and by virtue of what took place between Sherman and Lemmon relating to the assignment of the note.

The consideration of this claim involves two questions, namely: Did Sherman and Lemmon intend, by what took place between them relative to the sale and purchase of the note, the assignment, legally and equitably, of the guaranty as well as that of the note? And did they carry that intent into effect? Let us consider these questions in the order stated.

At the time of the transaction in question, the guaranty was practically the only thing that gave the note any value in Sherman's hands. The maker was insolvent, and could not pay it. The defendant was abundantly able to pay it. These facts were known to both parties at the time, and in view of this knowledge the transaction took place. Separated from the guaranty the note had little pecuniary value, and apart from the ownership of the note the guaranty had but little meaning or value. They belonged together, on the same paper, and were treated by all concerned as forming one instrument for the recovery of the amount due on the note. The parties each knew that if Sherman assigned the note alone it would be worthless in Lemmon's hands, and that the retention of his rights under the guaranty could in that event do Sherman no good.

Under these circumstances, Lemmon offers to purchase and Sherman agrees to sell the instrument in question for three hundred dollars, being nearly the full amount due on the note. The money is paid, the indorsement is made, and the instrument is delivered to Lemmon. We think there can be no doubt about Lemmon's intention. He certainly supposed he was getting all the rights which Sherman had under both contracts, or he never would have paid his money. And as to Sherman's intention there can be just as little doubt. He was acting in good faith, as the court finds. He must have known what Lemmon expected, and if he did not intend to give him the benefit of the guaranty, should have made such intention manifest. If Sherman intended to limit the operation of the

transaction to the assignment of the note proper, he could easily have done so by appropriate words. The defendant says that Sherman in his assignment uses the words "this note," and that these words "seem to restrict the transfer to the note, and exclude the guaranty." Read in the light of all the surrounding circumstances, this is not of much significance. These parties undoubtedly regarded the paper containing both contracts as one instrument, and probably used the word "note" as descriptive of the paper and all that was written upon it. To suppose that under the circumstances they intended the effect which the defendant claims resulted from this transaction, is to suppose that Sherman was a knave and Lemmon a fool, and for neither of these suppositions does the record afford the slightest ground. We feel bound to hold, therefore, that these parties, as honest men of average intelligence, intended the assignment of the guaranty as well as the assignment of the note.

The next question is, whether in doing what they did they carried out this intent.

The defendant says that no special assignment of the guaranty is claimed by the plaintiffs or found by the court, and if by this is meant that the contract of guaranty is not specifically mentioned or described in Sherman's indorsement, this is true.

Is such a specific assignment necessary under the circumstances? We know of no law which prescribes the form in which the intention of the parties in such cases shall be embodied; and where the law prescribes no form, it will, to accomplish rather than defeat their intent, give effect to such form as they choose to adopt.

Now, in the case at bar, Sherman takes the paper containing both contracts, and writes an assignment upon it, and delivers it to Lemmon, intending thereby to transfer to him, as we have seen, all the beneficial interest in both contracts which Sherman himself then possessed. Why is not this effectual to pass such interest, at least in equity?

Sherman fully intended and Lemmon fully expected such a result; and independently of Sherman's intent, his language and acts should be interpreted in the sense in which he had reason to suppose Lemmon understood them.

The contract and acts of Sherman in this matter should be construed with reference to all the surrounding circumstances,

the controlling consideration being to discover and give effect to the mutual intention of the parties.

Such an equitable assignment could certainly be made by a transaction of this kind if so intended. "In any case of the guaranty of a bill or note, the party to whom the guaranty is originally made may, in equity, assign his right to the holder at the time he transfers the bill or note, and thereby vest in him the equitable, although not the legal, title thereto: 2 Daniel on Negotiable Instruments, sec. 1774. Indeed, it is unnecessary to cite authorities upon such a point. No special form of words and no prescribed acts are necessary to constitute an equitable assignment. The delivery of a negotiable note without indorsement may operate as an assignment of it in equity: *Jones v. Witter*, 18 Mass. 304. The transfer of a debt or obligation usually carries with it as an incident all the securities for its payment, although such securities are not in terms transferred with the principal obligations: *Craig v. Parkis*, 40 N. Y. 181; 100 Am. Dec. 469. In a Virginia case, the court uses the following language: "If the contract of guaranty is not negotiable at law, along with the bond and coupons, it is assignable in equity, and an interest in it passes in equity to each successive holder of the bond or coupon. . . . In order to give effect to the manifest intention of the parties, the right to enforce the guaranty, unless lost by laches or otherwise, must be held co-extensive with the right to enforce a bond or coupon. The guaranty as an accessory to the bond or coupon follows it and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon": *Arens v. Commonwealth*, 18 Gratt. 768.

We think this language is quite applicable to the case at bar. We hold, therefore, that Sherman assigned in equity to Lemmon all the beneficial interest which the latter had in the contract of guaranty, and so Lemmon became the equitable and *bona fide* holder thereof, and as such was entitled to sue in his own name under our statutes. The defendant has cited no case which is inconsistent with this conclusion.

There is no error in the judgment of the court below.

NEGOTIABLE INSTRUMENTS — GUARANTY. — A valid contract of guaranty indorsed upon a writing obligatory passes by assignment to the assignee, and vests in him a right of action in his own name against the guarantor: *Killen v. Ashley*, 24 Ark. 511; 91 Am. Dec. 512. Compare *Smith v. Dickinson*, 6 Hamph. 261; 44 Am. Dec. 306, and particularly note.

IN RE CLAYTON.

[30 CONN. 507, 510.]

CONSTITUTIONAL LAW—INTOXICATING LIQUOR, STATUTE COMPELLING DISCLOSURE OF PERSON FROM WHOM PROCURED.—A statute requiring defendant, after conviction of intoxication, to disclose, "under oath, when, where, how, and from whom he procured the liquor by which his intoxication was produced," and providing that upon his refusal to make such disclosure "it shall be the duty of the magistrate before whom such trial is had to commit the accused for contempt of court," is not unconstitutional as being contrary to public policy and natural justice, nor as depriving the accused of the right to a trial by jury, nor as depriving him of liberty without due process of law, nor as denying him the equal protection of the laws, nor as making that a contempt of court by statute which is not proper matter for contempt.

G. P. McLean and A. Brainard, for the appellant.

W. Hamersley and F. H. Parker, for the appellee.

CARPENTER, J. The complainant was convicted of intoxication, and was required to disclose, under the act of 1889, chapter 167, "under oath, when, where, how, and from whom, he procured the liquor by which his intoxication was produced." He refused "to make such disclosure." Thereupon the magistrate (the judge of the police court of Hartford) before whom the trial was had proceeded "to commit the accused, for contempt of court, to the common jail" for ten days.

On a writ of *habeas corpus* he was brought before a judge of the superior court. The sheriff's return set out the proceedings in the police court, and the *mittimus* issued thereon. The complainant demurred to the return, because, he says, the statute under which the proceedings were had is obnoxious to constitutional provisions. The judge overruled the demurrer, and the complainant appealed.

Provisions for disclosures by persons found intoxicated, or arrested for intoxication, first appeared in the statute of 1854, and have since remained there, with some changes from time to time. Until 1889 disclosures were at the option of the prisoner, and could only be made before conviction; and upon being fairly made, they contemplated the discharge of the intoxicated person. The statute of 1889 made a radical change. It provides for disclosures only after conviction, does not discharge the prisoner, and the disclosure is made compulsory. Whether this act is a substitute for the statute previously existing, or is in addition thereto, is not now a material question.

The first ground of demurrer is, that the statute "is a deprivation of the right to a trial by jury, as provided by section 21 of article 1 of the constitution of Connecticut."

This objection misconceives the nature and character of the proceeding before the police court. The appellant was not then before the court as a defendant in a criminal prosecution. That had been his position; but upon his conviction that was changed, and he became, so far as this case is concerned, merely a witness. He was in no sense on trial,—no one was,—and therefore was not in jeopardy. The proceeding was not judicial, but ministerial.

For more than a century and a half we have had upon the statute-book a law authorizing the grand jurors in the several towns to meet and advise, and inquire into the offenses that had been committed, with power to summon and examine witnesses, and if need be, to punish for contempt: Gen. Stats., sec. 91. This proceeding is but an extension of the same power to other officers, for the same general purpose, namely, the protection of society by preventing crime, through the detection and punishment of offenders.

The magistrate acting in an administrative and not in a judicial capacity, the witness being in no jeopardy and exposed to no detriment provided he testifies fairly, this section of the constitution is not applicable.

The second ground of demurrer is, that "such a commitment on said statute is a deprivation of liberty without due process of law, as forbidden by section 9 of article 1 of the constitution of Connecticut."

Punishment for contempt by a court, or other tribunal duly authorized, is "due process of law" within the meaning of the constitution. The right and duty of the state to protect its jurisdiction and dignity by punishing for contempt, in proper cases, through its officers, is the sacred right of self-defense.

The third ground of demurrer is, that "the matter made a contempt of court by the statute is not a proper contempt, and it is incompetent for the legislature to suspend or abrogate the prisoner's constitutional prerogatives by making such refusal a contempt and providing a summary commitment therefor, since the refusal is entirely disconnected with any proceeding pending before the court, and has no relation whatever to the dignity or duty of the court, or to the administration of justice in any present or future case."

This objection rests entirely on the assumption that the testimony of the prisoner, when obtained, will be of no use; in effect, that the statute is a mere wanton exercise of power. But this assumption is not well founded. The statute provides that the testimony shall be certified and forwarded to the state's attorney. Its utility is a matter for the legislature to determine, and it has done so. It is not for the appellant or the court to say that the information is of no value, and has no relation "to the administration of justice in any present or future case."

The fourth ground of demurrer is, that "the statute is in violation of the Fourteenth Amendment to the United States constitution, in that it deprives the prisoner of the equal protection of the law in subjecting him to inquiries under summary proceedings and penalties to which other citizens who procure liquor are not liable."

All offenders against law or good morals are liable to be subjected to some inconveniences from which others are exempt. Of those so offending some will be detected and made to suffer such inconveniences, while others may escape. It was not the purpose of this amendment to place all such offenders upon an equal footing.

There is one error assigned that does not seem to be raised by the demurrer, namely, that "the court erred in ruling and holding that the statute is a valid statute, not contrary to public policy and natural justice."

Perhaps we have sufficiently answered this; but we will add that it is the duty of all good citizens when legally required so to do, to testify to any facts within their knowledge affecting public interests; and no one has a natural right to be protected in his refusal to discharge this duty. Public policy does not forbid, but on the contrary often requires, legislation to facilitate the administration of justice.

We find no error in the judgment appealed from.

CONTEMPT — IMPRISONMENT. — A statute is not unconstitutional because it provides for the imprisonment of persons found guilty of contempt for disobeying orders of the court, without a trial by jury: *Marriage v. Woodruff*, 77 Iowa, 291.

PORTER v. WOODHOUSE. ROBERTSON v. WOODHOUSE.

[50 CONNECTICUT, 382.]

DEEDS — DELIVERY. — It is an essential characteristic and an indispensable feature of every delivery of a deed, whether absolute or conditional, that there must be a parting with the possession of it, and with all power and control over it, by the grantor for the benefit of the grantee at the time of the delivery.

DEEDS. — **DELIVERY** of a deed is as essential to the passing of the title as is the signing or acknowledgment of it. It is the final act, without which all other formalities are ineffectual; and to constitute delivery, the grantor must part with the legal possession of the deed, and with all right to retain it. The present and future dominion over the deed must pass from the grantor in his lifetime.

DEEDS — DELIVERY, WHAT IS NOT. — Where a grantor formally executes a deed, except delivery, and then places it in a locked box, putting the latter in the possession of her servant, with the information that it contains the deed, but without divulging the name of the grantee therein and directing that the box be not opened until after the death and funeral of the grantor, which direction is followed, there is no such parting with the possession, custody, and control of the deed by the grantor as constitutes a valid delivery.

DEEDS. — **DELIVERY** of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee; but where the proof fails to show that the grantor ever did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of intent becomes immaterial.

C. E. Perkins and H. Cornwall, for the appellants.

A. F. Eggleston, for the appellee.

ANDREWS, C. J. These are two cases tried together, and depending on the same facts. The defendant is the executor of the will of Mrs. Julia Hinman, late of Hartford, deceased. The complaint prays that two deeds, now in the possession of the defendant, be delivered, one to the said Nora J. Porter, and the other to the said Julia Robertson. The only question in the case is, whether, on the facts found, these deeds were so delivered as to pass the title. The facts are as follows:—

Mrs. Julia Hinman, in her lifetime, and until her death, owned two houses in Hartford, in one of which she lived. She died on the tenth day of June, 1888, aged eighty-two years. Several years before her death she made a deed of one of these houses to Mrs. Porter, and at another time a deed of the other house to Mrs. Robertson. They were warranty deeds in form, and were expressed to be for a valuable

consideration. They were signed, sealed, witnessed, and acknowledged. All the requisites of a formal execution were complete, and each was filed on the back with the name of the grantee. Nothing was paid for them; they were in fact deeds of gift. The grantees never knew, until after the death of Mrs. Hinman, that they had been made. These deeds were placed by Mrs. Hinman in a box in which she kept her will, her bank-books, her policies of insurance, and other papers of like kind, and in which she had also a bag containing one thousand dollars in gold. The box was concealed in a closet in her bedroom. During the last year of her life a Mrs. Harriet Elliot lived with her, and was her only companion and attendant. Previous to the tenth day of April, 1888, Mrs. Hinman had told Mrs. Elliot that she had deeded away the two houses, but had refused to tell her to whom. On that day Mrs. Hinman fell, and was so severely injured that she feared she was going to die. On the morning of the 11th she told Mrs. Elliot where the box was, and requested her to bring it out. Mrs. Elliot did so, and placed it on the bed. Mrs. Hinman then said to Mrs. Elliot, "Take that box into your lap. I put it into your possession. My private papers are in that box, and a bag of gold containing one thousand dollars. My will is in there, and the deeds of these two houses. I told you before that I have deeded away these houses; on the deeds are the names of the persons who are going to have the houses." She then told Mrs. Elliot to take charge of the box, and put it back into the closet, and told her where the key to the box was; and that if she did not live, she wished her (Mrs. E.) to speak to E. G. Woodhouse, the defendant, and request him to read her will after the funeral. Then, after some further directions about the box, she closed the conversation by saying, "I have said enough, so that you will know what to do with the box in case I should die. If I live, I will talk further about the contents of the box. But don't you open it until after my funeral." After this conversation, Mrs. Elliot took charge of the box, but, so far as appears, never opened it until the day of Mrs. Hinman's funeral. In conversations subsequent to this one, Mrs. Hinman spoke about the bag of gold in the box, and of the provisions of her will, but never spoke about the deeds. Mrs. Hinman died about midnight of June 10, 1888. From the morning of the preceding day to the time of her death she was in a dying state, and in a deep stupor, during which she observed nothing and said nothing, except

that at about nine o'clock in the forenoon she suddenly exclaimed, "Call Robinson, call Robinson; there are those two deeds; one is for Julia Robertson and one is for Nora Porter." No Robinson was there at the time, and no one of that name had been in attendance upon her. Mrs. Elliot and a nurse, Mrs. Wright, were there, but Mrs. Hinman was not conscious of their presence or of what she was saying.

The delivery of a deed implies a parting with the possession and a surrender of authority over it by the grantor at the time, either absolutely or conditionally; absolutely, if the effect of the deed is to be immediate, and the title to pass or the estate of the grantee to commence at once; but conditionally, if the operation of the deed is to be postponed, or made dependent on the happening of some subsequent event. A conditional delivery is, and can only be, made by placing the deed in the hands of a third person, to be kept by him until the happening of the event upon the happening of which the deed is to be delivered over by the third person to the grantee. But it is an essential characteristic and an indispensable feature of every delivery, whether absolute or conditional, that there must be a parting with the possession of the deed, and with all power and control over it, by the grantor for the benefit of the grantee, at the time of delivery: *Prutman v. Baker*, 30 Wis. 644. The delivery of a deed is as essential to the passing of the title to the land described in it as is the signing of it or the acknowledgment. It is the final act without, which all other formalities are ineffectual. To constitute a delivery, the grantor must part with the legal possession of the deed and of all right to retain it. The present and future dominion over the deed must pass from the grantor. And all this must happen in the grantor's lifetime: *Younge v. Guilbeau*, 3 Wall. 636; *Cook v. Brown*, 34 N. H. 476; *Fisher v. Hall*, 41 N. Y. 421; *Jackson v. Leek*, 12 Wend. 105; *Fay v. Richardson*, 7 Pick. 91; *Alsop v. Swathel*, 7 Conn. 503; *Hoboken City Bank v. Phelps*, 34 Conn. 103; 2 Kent's Com. 439; Bouvier's Law Dict., tit. Delivery.

Upon the facts above recited, the superior court rendered judgment for the defendant, and dismissed the complaint. We think that judgment was clearly right, for the reason that Mrs. Hinman never intended to and never did part with the legal control over the deeds. The box in which the deeds were was in the charge of Mrs. Elliot as the servant and agent of Mrs. Hinman, and so remained till after Mrs. Hin-

man's death. The deeds were never taken out of the box till after her funeral. Mrs. Elliot never knew till that time the names of the grantees. She had never received any directions as to the deeds as such, apart from the other contents of the box. It is not and cannot be claimed that Mrs. Hinman parted with the possession of the box itself, or the control over the bag of gold, or of her bank-books, or of her will, or of her insurance policies. Yet all these were in the box with the deeds, and she parted with the possession and control of these just as much as she did of the deeds. The deeds were never separated from the other contents of the box. The conversation on the morning of April 11th clearly shows that Mrs. Hinman did not intend at that time to part with the control of the contents of the box. She intended to give further directions in regard to them. Her closing words were: "If I live, I will talk further with you about the contents of the box." That further talk she never had, and so her intent as to the deeds remained undisclosed. Mrs. Elliot was never made the custodian of the deeds for the benefit of the grantees. She at all times held them in the same way that she held the other things in the box, as the agent of Mrs. Hinman.

In reference to the conversation just mentioned, the superior court has found that Mrs. Hinman's sole purpose in the transaction was to give Mrs. Elliot information of the existence and contents of the box. It is claimed by the defendant that by such finding the superior court has left nothing for the examination of this court, for the reason that it excludes all intent on the part of Mrs. Hinman to transfer the title to the grantees named in the deeds. This may be true, but we do not place our decision upon it. The delivery of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee. As we are satisfied that Mrs. Hinman never did any act by which she parted with the possession of the deeds for the benefit of the grantees, the question of her intent becomes immaterial.

There is no error in the judgment of the superior court.

DEEDS, DELIVERY OF. — Delivery, or that which is legally its equivalent, is as essential to the validity of a deed as the signature of the grantor: *Coles v. Coles*, 122 Ind. 109; 17 Am. St. Rep. 345, and note as to what constitutes a delivery. Compare *Weisinger v. Cock*, 67 Miss. 511; 19 Am. St. Rep. 320, and note.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

MACON AND BIRMINGHAM R. R. Co. v. GIBSON.

[85 GEORGIA, 1.]

CONSTITUTIONAL LAW — RIGHT TO AMEND CORPORATE CHARTER. — When a state has reserved the power by general statute to change, modify, or destroy any corporation at will, and has subsequently granted a charter to a railroad corporation, giving it power to build its road where it may deem proper, the state may so amend such charter, after the corporation has located but before it has constructed its road, as to confine it to a specified route on certain enumerated conditions as to the construction of the road through a certain county.

CONSTITUTIONAL LAW — RIGHT TO AMEND CORPORATE CHARTER — OBLIGATION OF CONTRACTS. — Where a state has reserved the power by general statute to change, modify, or destroy any corporation at will, such right is not abridged or in any manner affected by executory contracts entered into by a corporation with third persons, or by such persons with their subcontractors, before an act amending such corporation's charter was passed. All parties are bound to take notice of the general law of the state under which the power exercised was reserved. If such contracts cannot be performed consistently with the alteration in the charter made by the amending statute, their performance, in so far as thus hindered or obstructed, will be excused, under the rule that performance of contracts rendered impossible by act of law is excused.

CORPORATION — AMENDMENT OF CHARTER. — When the charter of a corporation is amended under power reserved in the state, by adding a proviso which operates as a limitation and restriction upon some of the general terms of the charter, such amendment is valid, so long as there is no such repugnance in the proviso to the main purpose of the charter as that the two cannot stand together; and if there is an irreconcilable conflict between them, the amendment will prevail.

CONSTITUTIONAL LAW. — **TITLE OF STATUTE** and the act itself must correspond, not literally, but substantially, and this correspondence is to be determined in view of the subject-matter to which the legislation relates; and when the title of an act indicates that a thing is to be or may be done, it is no variance from it for the body of the act to provide that the thing shall be done, or not done, on some condition.

CONSTITUTIONAL LAW — MUNICIPAL AID TO CONSTRUCT RAILROAD. — Where a statute amending a railroad charter provides that the road shall run in and through the corporate limits of a town, or within one mile of the court-house thereof, on certain conditions, and that the increased cost "shall be paid by the said town or the citizens thereof," but does not impose any tax on the persons or property within the town, nor provide that it shall raise such funds as public revenue, and contemplates that the payment is to be made by the people voluntarily, and not under compulsion, such statute is not unconstitutional as seeking to enable the town in its corporate capacity to apply corporate money to the construction of a railroad.

INJUNCTION TO PROTECT PUBLIC INTERESTS, WHO MAY APPLY FOR. — Where a statute amending a railroad charter provides that the road shall run in and through the corporate limits of a town, upon certain conditions, the citizens of the town, upon offering to comply with their part of the conditions, have, as a class, such special and particular interest in the matter involved as will support an application for an injunction to protect that interest. Such interest being common to all of such class as a community, and it being composed of numerous individuals, some may sue in behalf of all.

CORPORATIONS — NON-RESIDENCE WAIVER OF WANT OF JURISDICTION. — Objection to the jurisdiction of the court on the ground of the non-residence of the defendant corporation may be and is waived by appearing and answering without at the same time filing or presenting this objection to the jurisdiction.

INJUNCTIONS, ISSUE OF, UPON CONDITION. — The granting or continuing of an injunction is not a matter of strict right in the parties, but of sound discretion in the judge of the court, and the court, whether of law or of equity, should always impose just terms as a condition to its interference by interlocutory injunction in behalf of suitors.

INJUNCTION — CONDITION UPON WHICH MAY ISSUE. — Where conditions remain to be performed by both parties to the litigation, an injunction should not be granted which absolutely binds one person to perform his part of the conditions, while it leaves the other party free. The party in whose favor the injunction is granted should first be required to give a secured bond that he will perform his part of the conditions.

Gustin, Guerry, and Hall, T. B. Cabaniss, and N. J. Hammond, for the plaintiffs in error.

Lanier and Anderson, Hall and Hammond, J. A. Cotton, J. Y. Allen, and M. H. Sandwich, for the defendants in error.

BLECKLEY, C. J. The Macon and Birmingham Railroad Company was incorporated by an act of the general assembly passed in December, 1888: Acts of 1888, p. 164. The act provided, amongst other things, "that said company shall have power and authority to survey, lay out, and construct, maintain, and equip a railroad from the city of Macon, in the county of Bibb, or from some point on the present line of the Georgia, Southern, and Florida railroad, through the county

of Bibb, and through the following counties, or such of them as said railroad company may deem fit, to wit, Houston, Crawford, Monroe, Upson, Pike, Meriwether, Troup, and Heard, to some point on the state line of Alabama, by the most direct and practicable route, to be judged of by them, and in the direction of the city of Birmingham, Alabama." Part of the statute law of this state in force when this act of incorporation was passed were two sections (1651 and 1682) of the code, as follows: "Persons are either natural or artificial. The latter are the creatures of the law, and except so far as the law forbids it, subject to be changed, modified, or destroyed at the will of their creator; they are called corporations." "In all cases of private charters hereafter granted, the state reserves the right to withdraw the franchise, unless such right is expressly negated in the charter." There is no such negative in the charter of this company. These provisions of the code have been construed by the supreme court of the United States in *Central R. R. & B. Co. v. Georgia*, 98 U. S. 359. That court, adjudicating upon a charter granted in 1863, said: "These provisions of the code became, in substance, a part of the charter: *Maine Cent. R. R. Co. v. Maine*, 96 U. S. 499. It is quite too narrow a definition of the word 'franchise,' used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So it was held in *Central R. R. & Banking Co. v. Georgia*, 54 Ga. 401, and so it must be held now, especially in view of the statutory provision of the code that private corporations are subject to be changed, modified, or destroyed at the will of their creator." The constitution of 1877 declares that no law making irrevocable grants of special privileges or immunities shall be passed; and that no grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the corporation: Code, sec. 5025, 5026.

The company proceeded under its charter to locate its line of railroad through Upson County, but before it constructed any part of the same in that county, the general assembly amended the charter by an act approved November 7, 1889: Acts of 1889, p. 336. This amendment provided that

if the railroad runs through Upson County, and within five miles of the town of Thomaston, it shall run into and through the corporate limits of that town, or within one mile of the court-house, provided it shall not cost the company any more from where the road crosses the five-mile limit on the east of the town to the "Rogers property," than any other route within that limit; the cost is to be determined by two competent disinterested civil engineers, one to be selected by the company and the other by the mayor of Thomaston, to locate the route proposed by the company within the five-mile limit, and the route within the town, or within one mile of the court-house, on a way which is equitable and just both to the company and the town; these engineers are to estimate the cost of building such line, and if they fail to agree, they are to appoint a third disinterested competent civil engineer, who shall decide and determine the matter; in estimating the cost of the respective routes, the safety and permanency of the road-beds, and keeping up the same, are to be considered; whatever amount the estimate shows it will cost more to go through the corporate limits, or within one mile of the court-house, than the route proposed by the company within the five-mile limit, shall be paid by the town of Thomaston or the citizens thereof; upon refusal to pay the same, the company is released from building the road through the corporate limits or within one mile of the court-house; a sum equal to such extra cost, if any, is to be paid into some solvent national bank of this state when the road is built from the city of Macon to the five-mile limit, subject to be checked out by the company when the road is built through the five-mile limit. The company refuses to accept this amendment or to comply with its terms. The citizens of Thomaston, or some of them, offer to comply on their part, and insist upon compliance by the company. This difference gives rise to the present controversy

1. The first question is, whether the state, through the legislature, could ingraft this amendment upon the charter without the consent of the company, inasmuch as the original charter granted power and authority to construct and maintain a railroad through the county of Upson by the most direct and practical route, to be judged of by the company, with no condition whatever. The amendment certainly withdraws a portion of this broad franchise, on certain conditions. As modified by the amendment, the charter still allows the company to select its own route at will through the county, if in so doing

it should not bring the road within five miles of Thomaston. By bearing away from that town so as not to approach within the five-mile limit, the company can render this amendment wholly inapplicable to its operations. This being done, the charter will be the same with the amendment as without it. Only by approaching as near to Thomaston as five miles, in locating and constructing its line, will any affirmative duty whatever devolve upon the company by virtue of the amendment. If such an alteration as this in the charter of a corporation cannot be made, it is difficult to imagine any material alteration that could be made; and, of course, if the reserved power of changing, modifying, and destroying will not embrace material alterations, the reservation is useless and worthless. No part of the company's line in Upson County being yet constructed, none of the company's property is taken or destroyed by the amendment. A portion of the franchise to locate the line at will is withdrawn, and the amendment takes away nothing else; it simply resumes what the state could have withheld in granting the charter if the legislature had been so disposed. For this reason, if not for others, such cases as *Detroit v. Detroit etc. Road Co.*, 43 Mich. 140, are without application to the question before us. The authorities more directly in point are such as *Tomlinson v. Jessup*, 15 Wall. 454; *Miller v. State*, 15 Wall. 478; and *Railroad Co. v. Georgia*, 98 U. S. 859.

Where an attempt is made to deprive a corporation of its property by amending its charter, doubtless the observations of Cooley, J., in *Detroit v. Detroit etc. Road Co.*, 43 Mich. 140, ought to be recognized as sound. He says: "But for the provision in the constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may have rightfully acquired. In the most arbitrary times such an act was recognized as

pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift, or descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and is then protected by the 'law of the land.' " No constitutional principles are infringed by exercising a reserved power to revoke special privileges or immunities, unless the provision of our own constitution is violated, which forbids doing it in such manner as to work injustice to the corporators or creditors of the corporation. Whether the mode adopted by the legislature in a given instance is just in this respect or not, whilst primarily a legislative question may, if palpably decided wrong, become a judicial question. But there is not the slightest indication of injustice in the amendment which we are considering. We see not why the legislature, had it thought proper, could not have passed such an amendment, and made it a part of the charter, by simply enacting that if the company brought its road within five miles of Thomaston, it should locate and construct its line through the town wholly irrespective of the comparative cost of two or more routes. To require this to be done on the further condition that any increased cost should be provided for and paid by others was giving the company a gratuitous rather than a necessary measure of justice. But for the voluntary grant from the legislature, the company would have no right to construct and use over the lands of the citizens of Upson any railroad whatever; and permission to do so, attended with an express reservation of a right to revoke or modify the permission, was no pledge to the company that it might build its road where it pleased, notwithstanding the legislature might please to order otherwise. The charter was as much qualified by the terms of the code above quoted as if these sections of the code had been incorporated in the charter itself. For the corporation to complain that the legislature did what it reserved the right to do, and did it before any portion of the line had been constructed in Upson County, seems to us wholly without reason. The company should have been prepared at the beginning, and kept itself prepared, for such a mild and moderate exercise of the state's reserved power.

2. Nor is the right of the state so to amend or modify the charter abridged or in any manner affected by executory con-

tracts entered into by the company with third persons before the amending act was passed. The Macon Construction Company, in dealing with the railroad company, was bound to take notice of the general law of the state, under which the right and power were reserved which have been exercised. A tenant at will cannot make contracts with reference to the estate which will limit the power of the landlord to terminate the estate by means compatible with its legal nature. So a corporation in the possession of franchises held at the will of the state cannot hinder the resumption or modification of those franchises by entering into executory contracts with third persons. Nor can that effect be wrought by like contracts between the parties immediately contracting with the corporation and subcontractors under them. On no contract whatsoever does the amendment now in question have any direct effect. Its only effect upon contracts is incidental, and if they cannot be performed consistently with the alteration in the charter made by the amending statute, their performance, in so far as thus hindered or obstructed, will be excused, the rule of law being that performance of contracts, when rendered impossible by act of law, stands excused: *Bishop on Contracts*, 594; *Jones v. Judd*, 4 N. Y. 411; *Heine v. Meyer*, 61 N. Y. 171; *Cordes v. Miller*, 39 Mich. 581; 33 Am. Rep. 430; *Knoxville v. Bird*, 12 Lea, 121; 47 Am. Rep. 326; *Mississippi etc. R. R. Co. v. Green*, 9 Heisk. 588; *Odlin v. Insurance Co.*, 2 Wash. C. C. 812; *Gray v. Sims*, 8 Wash. C. C. 276; *Brick Presbyterian Church v. New York*, 5 Cow. 538; *Baylies v. Fettyplace*, 7 Mass. 325; *Melville v. De Wolf*, 4 El. & B. 844; *Reid v. Hoskins*, 4 El. & B. 979; *Touteng v. Hubbard*, 3 Bos. & P. 291; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Newby v. Sharpe*, L. R. 8 Ch. Div. 89; Co. Lit. 206 a; Com. Dig., tit. Condition, D, 1, D, 7, L, 18; *Abbott on Shipping*, 596. Under these authorities, if the Macon Construction Company, or a subcontractor under it, was under a stipulation to complete the railway by a given time, and if time was of the essence of the contract, a valid excuse for failing so to do would be furnished by this subsequent legislation, if that legislation has rendered or should render it impossible to complete the work by the stipulated time. In so far as this or any other executory contract has been rendered less valuable or profitable to the parties concerned by the legislation in question, that is a consequence which should have been foreseen as possible, and which must be accepted by the parties as an incident of the exercise by

the legislature of its rightful legislative power. Surely it cannot rationally be contended that because the alteration of charters with respect to the latitude of the franchises granted may or does operate unfavorably upon executory contracts made by or under the corporations the charters must remain unaltered in this respect, and the reserved power in the legislature be reduced to a power in name only.

8. All the provisions introduced by the amending act into the original charter are added to the first section of the charter in the form of a proviso to the same, the initial words of the new matter being "Provided further." It is contended that because the original charter grants to the corporation the right to locate and construct the road where the company pleases, and this amendment, by way of proviso, limits or qualifies that right as to a portion of the line, the proviso is repugnant to the purview of the charter, and is therefore void. Also, that as the whole amendment comes in under the form of a proviso, the whole amendment is void. It is clear, however, that there is no such repugnance in the proviso to the main purpose of the charter as that the two cannot stand together. The amendment operates by way of limitation or restriction upon some of the general terms of the charter, and that such is a proper function of a proviso is laid down by the authorities: *Minis v. United States*, 15 Pet. 423; *Potter's Dwarris on Statutes*, 118; *Sedgwick on Statutory and Constitutional Law*, 49; *Endlich on Statutes*, secs. 184, 185; *Savings Institution v. Makin*, 23 Me. 360. For extreme cases in which provisos have been upheld in the charters of corporations, see *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464; *Mason v. Boom Co.*, 8 Wall. Jr. 252.

But here the charter is not rendered inconsistent and destructive of itself by the introduction of this amendment. The matter of the amendment consists of a saving or exception which might have been introduced originally into the charter in the form of a proviso, or any other form, and we see no reason why an amending act passed by a subsequent legislature, or at a subsequent session of the same legislature, could not modify or repeal anything whatsoever in the act amended, and in any form the legislature might choose to adopt. All repealing acts, for instance, might take the form of provisos. Why not? The most that could be said of such repealing acts would be, that they were an abuse of the pure and proper proviso, — abuses of which are common occurrences in legislation:

See Coode on Legislative Expression, 50; *Georgia R. R. & B. Co. v. Smith*, 128 U. S. 174. In so far as an act passed by a subsequent legislature, or at a subsequent session of the same legislature, is inconsistent with a prior act on the same subject, a repeal of the prior act is effected; and it seems to us to make no difference that the later act may, in whole or in part, consist of a proviso. The rule, so far as we know, is universal that where there is an irreconcilable conflict between two statutes, the later of the two must prevail, and the former give way.

4. Another charge urged against the amending act is, that it is unconstitutional, for the reason that it contains matter different from what is expressed in the title. The title is in these words: "An act to amend an act entitled an act to incorporate the Macon and Birmingham Railroad Company, approved December 26, 1888, so as to require said railroad to run into and through the town of Thomaston, in the county of Upson, and for other purposes." The body of the act requires that, on the conditions mentioned, the railroad shall run into and through the corporate limits of Thomaston, "or within one mile of the court-house." The objection urged is, that this alternative requirement is not expressed or indicated in the title. Doubtless the legislature thought that to locate a railroad within a mile of the court-house was, for all substantial purposes, the same as bringing it into and through the town. The corporate limits and the actual limits of the town may not be co-extensive; and whether they are or not, the reasonable purpose and object of the act, as indicated in the title, might be accomplished without keeping the body of the act exactly within the letter of its title. The meaning of the constitutional requirement is, that the title and the act must correspond, not literally, but substantially; and this correspondence is to be determined in view of the subject-matter to which the legislation relates. We are satisfied that the title of this amending act is reasonably sufficient to cover all the contents of the amendment. The body of the act requires that the railroad shall run into and through the corporate limits of the town, unless, on certain conditions, it shall be located within one mile of the court-house, and outside of the corporate limits. The civil engineers therein provided for must locate it within those limits, or so near thereto as to be within one mile of the court-house. When the title of an act indicates that a thing is to be or may be done, it is no variance

from it for the body of the act to provide that the thing shall be done, or not done, on some condition. Here one of the conditions on which the road is to run into and through the corporate limits of Thomaston is, that the engineers, in the exercise of the discretion with which they are intrusted, shall not locate it elsewhere within a mile of the court-house. For the purposes of the act, the town may be considered as extending a mile from the court-house, whether the corporate limits have that extent or not.

5. Another objection urged to the amendment is, that it seeks to enable the town of Thomaston, in its corporate capacity, to apply corporate money or revenue to the construction of a railroad. We think it has no such purpose, but that where the act says that the increased cost "shall be paid by said town of Thomaston, or the citizens thereof," it means that the town is to act as a community, not as a corporation, and that "town" and "citizens" both mean the people of the town. The payment is to be voluntary, not compulsory. The corporation is not to raise the funds as public revenue, but the people are to contribute the same freely and voluntarily. If they fail to do this, the amendment is to be without any ultimate effect on the location of the road. No tax or tribute whatever is laid, or to be laid by virtue of this act, upon property or persons within the town. Neither the raising nor the expenditure of public money is contemplated. Private means alone are to be used, and if from that source the requisite fund is not raised in due time, the railroad company will be at liberty to proceed as though the amending act had not been passed.

6. We come now to the question whether the citizens of Thomaston can, by petition in the nature of a bill in equity, invoke judicial aid for the purpose of restraining the company from violating this amendment to its charter, and compelling it to co-operate with them in administering the provisions of the amendment. No doubt the general rule is, that the state alone will be heard to complain of a corporation for not conforming to the terms of its charter in matters affecting the public interest; or at all events, that the attorney-general must be a party to the suit, either as plaintiff or defendant: *Green's Brice on Ultra Vires*, 595, 602. But here the immediate interest involved and sought to be protected is, not that of the general public, but the special and peculiar interest of the town of Thomaston. The object of the legislature in prevent-

ing the construction of this railroad within five miles of the town, unless it should pass within one mile of the court-house, was to preserve that town from decline and decay in consequence of having a railroad in the vicinity, but not near enough to hinder some rival or competing town from springing up. The general public might or might not have an interest in the measure, but it is certain that the citizens of Thomaston have a vital and peculiar interest therein. The amending act contemplates that that interest shall be respected, and provides means for its protection upon the assumption that the company will conform to the terms of the act. These terms create a legal obligation on the part of the company, and it seems to us that a corresponding right in the citizens as a community, to have that obligation enforced, is created by the act. The refusal of the company to perform its legal duties to the citizens of Thomaston is a wrong to them, and the wrong is of such a nature as to admit of no adequate and appropriate remedy save a proceeding to compel a specific performance by the company of the requirements of the act. As we have already said, the company can relieve itself and remain free from any duty to the citizens of Thomaston by not constructing its road within five miles of that town, but it cannot come within five miles with its work and not comply with the act. To do so would be a violation of its charter and a special and particular injury to the citizens of the town, who are no less entitled to the provisions of the amended charter, made for their special benefit, than the company is to the provisions of the original charter unrepealed, which were made for its benefit. The citizens have as much right to complain of the company for denying them their dues under the charter as the company has, or would have, to complain of any citizen for denying it the enjoyment of any of its chartered rights. It is a mistake to suppose that corporations are created alone for their own benefit, or that their privileges are more sacred than their duties. We see not why a local and special duty may not be enforced at the instance and by the suit of the local and special body of citizens recognized in the charter as immediately interested in some of its provisions.

7. A further question is, whether some of the citizens of Thomaston, suing in behalf of themselves and all their fellow-citizens of the town, will be sufficient as parties plaintiff in this proceeding, or whether all the citizens must join as such plaintiffs. The interest being common to all as a

community, and the citizens being numerous (of which fact we can take judicial notice from public statistics), we think the case is provided for by a well-recognized rule which has long prevailed in equity, and that some, as representatives of the class, may sue for all: Story's Eq. Pl., secs. 94 et seq.; Mitford's Eq. Pl., 167 et seq.; Spence's Eq. Jur., 656; 1 Daniell's Chancery Practice, 234, 237; Pomeroy's Remedies and Remedial Rights, secs. 388 et seq.; Hawes on Parties, secs. 92; 1 Pomeroy's Eq. Jur., secs. 251, 255, 269, 274; *Phillips v. Hudson*, L. R. 2 Ch. 243; *Comm'rs etc. v. Glasse*, L. R. 7 Ch. 456; *Smith v. Swormstedt*, 16 How. 302. It is true that as only two of the citizens have become parties, it is rather a small representation of the whole community; but considering the publicity of the case and of the interest involved in it, and the fact that the suit is located in Upson County and will be tried (if tried at all) at the county town, which is the town whose citizens are interested, there can be no cause to apprehend that the two plaintiffs on the face of the petition will be disposed, or if so disposed, allowed to misrepresent the community in whose behalf they have brought this suit. No doubt it is somewhat discretionary with a court of equity as to how many representatives of a class will, or ought to be, regarded as a fair representation of the whole class in the given instance. We simply rule that this is a proper case for some of the citizens to represent all, and that the number of representatives, though the smallest that could be recognized, is not, as matter of absolute law, insufficient.

8. One of the errors assigned is, that the judge erred in holding that the superior court of Upson County has jurisdiction of the case; but it nowhere affirmatively appears, in the bill of exceptions or the transcript of the record, that any question was raised as to the jurisdiction. From the assignment of error it might be implied that some such question arose and was decided; but we have no information or intimation as to the ground or grounds suggested and insisted upon as objections to the jurisdiction. In the argument here, non-residence in the county of Upson of the two corporation defendants (that is, the railroad company and the construction company) was, we believe, the ground mentioned; but this is a ground which can be waived, and which was waived, inasmuch as these companies appeared and answered without at the same time filing or presenting this objection to the jurisdiction. It is needless to add more on this topic.

9. With respect to the character and scope of the injunction granted, we see nothing to disapprove, except that we think any interference with the *mandamus* proceeding was needless, and, under the circumstances, improper. For the protection of the citizens of Thomaston it is quite sufficient that the railroad company be restrained from constructing its proposed line anywhere within five miles of the town, without conforming to the amended charter. No amount of preparation, by securing the right of way or otherwise, will violate the charter or harm the town; and inasmuch as the company must wait for future developments to ascertain that it cannot lawfully construct its line on the location which it has chosen, there is good reason for not interfering with its preparation to use that route if, by reason of failure on the part of the citizens of Thomaston to perform some of the conditions devolving upon them, the route already chosen should be the one ultimately adopted. It should be borne in mind that any action whatever by the citizens is optional and voluntary. The amended charter seeks to apply compulsion to the company, but none whatever to the citizens. We think the company should be left free to secure the right of way, if it should think proper to do so, along the line of its choice, irrespective of what the citizens may or may not hereafter do. The company may not choose to avail itself of this privilege whilst the general controversy remains in an unsettled state; but whether exercised or not, the privilege should be accorded, as no violation of the charter is, or will be, involved in it. The duty of the company to yield up the line of its choice and adopt another is wholly conditional upon the will and conduct of the people of Thomaston. At least this will be so, provided the cost of the line by or through the town exceeds the cost of that around the town. It is not always that people continue in a willing mind to raise money and deposit it in bank, or, with ever so good a will, that they can command the means if the amount to be forthcoming should be very considerable. We think the injunction should be modified so as not to extend to the *mandamus* proceedings, and we direct accordingly.

10. A court of equity, or a court of law in the exercise of equitable functions, may, and should, always impose just terms as a condition to its interference by interlocutory injunction in behalf of suitors. The granting and continuing of an injunction is not matter of strict right in the parties, but of sound discretion in the judge of the court. In the ex-

exercise of such discretion, it seems highly inexpedient to hold one of the parties to the litigation absolutely bound, whilst the other party remains perfectly free. This would have the appearance of subjecting the former to the will, or even the caprice of the latter. In view of the fact that the citizens of Thomaston may, after the cost of the two routes is estimated in the manner pointed out by the amended charter, elect ultimately not to advance and deposit the money requisite to defray the excess of cost of the town line over that of the country line, it seems to us reasonable that upon this excess (if any) being ascertained, the plaintiffs in this petition should be required, as a condition of the continuance of the injunction after that time, to give bond and security to insure a deposit of the money, according to the amended charter, as soon as the railroad shall be built to the five-mile limit. This bond should be in double the amount of the excess of cost ascertained by the estimate of the engineers, and should be payable to the railroad company, with a condition to deposit in bank, conformably to the amended charter, a sum equivalent to such excess; or on failure so to do, to answer to the company for all damages which it may sustain by reason of this injunction having been granted and continued in force.

We direct that the judge of the Flint circuit, or some other judge should be disqualified, pass an order requiring such bond and security to be given; and that upon failure to comply with its terms, the injunction be dissolved.

Judgment affirmed, with direction.

CORPORATIONS, CHARTERS OF. — All privileges granted by the state are made subject to the right of the state to prescribe the conditions upon which those privileges shall be enjoyed, whether it expressly reserves this power or not: *Delaware etc. R. R. Co. v. Central etc. Tr. Co.*, 48 N. J. Eq. 71; *Commonwealth v. New York etc. R. R. Co.*, 129 Pa. St. 463; 15 Am. St. Rep. 724. The provisions of a general law respecting corporate powers enter into and form a part of the charter of a corporation: *People v. Chicago G. T. Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; *Franklin Co. Ct. v. Bank*, 87 Ky. 370.

An act creating a public corporation may be altered or modified at will by the legislature: *Montpelier Academy v. George*, 14 La. 395; 38 Am. Dec. 565. Compare extended note to *Commonwealth v. Cullen*, 53 Am. Dec. 460-474; note to *Miners' Bank v. United States*, 43 Am. Dec. 118-121. But after vested rights have been acquired, the charter of a corporation cannot be so amended as to impair them, unless the power to amend is expressly reserved: *Cincinnati etc. Ry Co. v. Clifford*, 113 Ind. 460; *Beislers v. Citizens' Bank*, 9 La. 506; 29 Am. Dec. 453. A grant to a corporation which merely confers upon it a new right, or enlarges a right already possessed, without any consideration or any additional burden imposed, is nothing more than a license, which may be repealed at any time: *Pennsylvania Ry Co. v. Bowers*, 124

Pa. St. 123. The enlargement by the legislature of the powers of a municipality cannot, by implication, destroy or alter the charter of a corporation previously granted by the city: *Grand Rapids v. Hydraulic Co.*, 66 Mich. 602.

SUMMARYS.—**TITLE AND DUE OF THE ACT.**—The title of an act and the act itself must substantially correspond one with the other: *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707, and note; *Fidelity etc. Co. v. Shenandoah F. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858, and note; *Newendorff v. Duryea*, 69 N. Y. 587; 25 Am. Rep. 235, and note 238-246; note to *People v. McGinn*, 69 Am. Dec. 642, 646.

PARTIES.—All parties in interest should be joined in actions seeking for equitable relief: *Allison v. Skilling*, 27 Tex. 459; 86 Am. Dec. 623, and notes; note to *Tate v. Ohio etc. R. R. Co.*, 71 Am. Dec. 311-316.

APPEARANCE IN ACTIONS, EFFECT OF.—A voluntary appearance and the filing of an answer or a demurrer waives all objections as to jurisdiction of the persons: *Union F. Ry Co. v. De Bush*, 12 Cal. 294; 13 Am. St. Rep. 221, and note.

INJUNCTIONS.—The complainant must allege facts sufficient to make out his cause of action, before an injunction will be granted: *Moore v. Silver F. Min. Co.*, 104 N. C. 534. The granting, continuing, or dissolving of injunctions is largely within the discretion of the court: *Carleton v. Rugg*, 149 Mass. 580; 14 Am. St. Rep. 446, and note. And upon the issue of an injunction, whether or not a bond is necessary depends upon the discretion of the judge who orders it: *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699. Compare *Apalachicola v. Apalachicola Land Co.*, 9 Fla. 340; 79 Am. Dec. 264.

HARWELL v. SHARP BROTHERS.

[35 GEORGIA, 124.]

GARNISHMENT OF WAGES IN FOREIGN STATE.—An attorney who is the holder by assignment of a claim by a creditor against his debtor may garnish the wages due such debtor, in another state than that in which the parties reside, and thus compel payment without becoming liable in damages, although the object of the proceeding is to evade the law of the state where the parties reside, which exempts such wages from garnishment.

Haygood and Douglas, for the appellant.

Arnold and Arnold, for the respondents.

BLECKLEY, C. J. By the statute law of this state, "all journeymen mechanics and day-laborers shall be exempt from the process and liabilities of garnishment on their daily, weekly, or monthly wages, whether in the hands of their employers or others": Code, sec. 3554. We are not informed by anything directly alleged in the plaintiff's declaration whether or not any similar law prevails in the state of Tennessee. The

fair inference from what is alleged would be that there is no like exemption in that state, or, at least, none of which non-resident debtors could avail themselves. It appears that the defendants, who were creditors of the plaintiff, for the purpose of resorting to a Tennessee forum, and to evade this provision in the laws of Georgia, transferred their account to their attorney and caused attachment to issue in Tennessee and a garnishment to be served on the Western and Atlantic Railroad Company, who was indebted to the plaintiff for wages earned as a daily laborer. The effect of this garnishment was to constrain the plaintiff to pay the debt, in whole or in part, which he owed to the defendants, the sum paid being thirteen dollars. This is the grievance of which he complains, alleging that he was injured and damaged thereby in the sum of two thousand five hundred dollars. Both parties being citizens of Georgia, it is not unlikely that, if application had been made in time, an injunction might have been obtained restraining the defendants from prosecuting their attachment and garnishment in Tennessee. Ample and apparently sound authority for so doing may be found: *Snook v. Snetser*, 25 Ohio St. 516; *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448; *Teager v. Landsley*, 69 Iowa, 725; *Hager v. Adams*, 70 Iowa, 746; *Mumper v. Wilson*, 72 Iowa, 163; 2 Am. St. Rep. 238; *Wilson v. Joseph*, 107 Ind. 490.

It does not follow, however, that because the plaintiff might have asserted his exemption in this way, and claimed the benefit of the law of his own state, it was in any sense unlawful or legally wrongful for the defendants to bring their attachment in Tennessee, and use there the remedy of garnishment furnished by laws of that state. Unless restrained by some tribunal of their own state, they were but exercising a privilege common to all citizens of the United States. While left free to act according to their own will in the use of remedies, they had as much right to sue in Tennessee as they would have had if they were citizens of that state: *Morgan v. Neville*, 74 Pa. St. 52. In dealing with a somewhat similar question, the supreme court of Massachusetts, in *Lawrence v. Batcheller*, 131 Mass. 504, speaking by Field, J., said: "The argument of the plaintiffs in the case at bar is, that as it was contrary to equity for the defendant to proceed with his suits to judgment, and to a satisfaction of the judgment from the funds attached, so it is contrary to equity for him to retain the money so obtained; and that they can maintain an action at law against

the defendant for money had and received to their use, because the money *ex æquo et bono* belongs to them. This argument rests upon the assumption that courts of law will afford a remedy in damages for all wrongs done, which courts of equity, if seasonably applied to, will prevent; but this is not true. Courts of equity recognize and enforce rights which courts of law do not recognize at all; and it is often on this ground that defendants in equity are enjoined from prosecuting actions at law." The plaintiff may have had his election to bring the defendants' rights, as against his wages, to the test of Georgia law, or allow them to be tested by Tennessee law. This election could be exercised, however, only in due time and proper manner. He could not allow the law of Tennessee to be applied to the case, and afterwards, by such an action as this, have the law of Georgia applied to it. His remedy, if he had any, was to prevent, by injunction upon his adversary, the application of Tennessee law as a rule of adjudication. This he did not do, otherwise than by paying the debt. Although it is not distinctly stated, we think it is to be inferred from the language of the declaration that he paid before the proceeding in Tennessee reached a conclusion by judgment. Had it resulted in a judgment, there can be no doubt, assuming that the attachment and garnishment were regular according to the laws of Tennessee, that such judgment would have to be treated in Georgia as having the same effect as would be ascribed to it in Tennessee: *Green v. Van Buskirk*, 5 Wall. 310; 7 Wall. 189. A case very similar to the present has been decided in Indiana, and it was held that, even though there was a statute making the act complained of penal, no recovery could be had for the transfer of a just debt, and proceeding upon it by attachment in another state, though the effect was to deprive the debtor of his exemption allowed by the laws of his own state, of which state the creditor also was a citizen: *Uppinghouse v. Mundel*, 108 Ind. 238. The soundness of that adjudication may be questioned, inasmuch as there was an express statute violated. But with us there is no such statute, and we are therefore not required to go the full length of this Indiana precedent. Upon no recognized theory of a malicious abuse of process, or the malicious prosecution of a civil action, can the declaration before us be upheld. There was a just debt, and a lawful resort to a competent forum (nothing to the contrary being alleged) for its collection, and payment was made either pending the suit or

after judgment. The debt was thus in whole or in part extinguished. The money paid is no longer that of the debtor, but has become the property of the creditor. While there may have been damage, there has been no legal injury, no wrong done to the plaintiff, for which any court adjudicating upon legal principles can afford redress.

There was no error in sustaining the demurrer to the declaration.

Judgment affirmed.

EXEMPTIONS — GARNISHMENT OF WAGES — CONFLICT OF LAWS — When a corporation is garnished for a debt due to a citizen who is a resident of another state, the exemption laws of such state cannot avail as a defense to the garnishee, unless the debt is also exempt by the laws of the state where the garnishee is summoned: Note to *Munger v. Wilson*, 2 Am. St. Rep. 341. See also *Berry v. Davis*, 77 Tex. 191; 19 Am. St. Rep. 748, and note.

Contrary to the doctrine of the principal case is the rule laid down in *Drake v. Lake Shore etc. Ry Co.*, 69 Mich. 163, 13 Am. St. Rep. 382, where it is decided that a creditor who is a citizen of one state cannot, by assigning his claim to a citizen of another state, use the courts of that state to collect a debt against a citizen of a former state, whose person or property is not within the jurisdiction where the suit is brought, and whose wages, sought to be reached by garnishment, are exempt under the laws of his state.

PATTERSON v. STATE.

[26 GEORGIA, 121.]

ASSAULT WITH DEADLY WEAPON — PRESUMPTION OF INTENT TO KILL — An assault made with a weapon likely to produce death, but from which no killing results, does not raise a presumption of an intent to kill. Malice in an assault by stabbing does not necessarily include an intention to kill.

R. J. Jordan, for the plaintiff in error.

C. D. Hill, solicitor-general, for the state.

BLANDFORD, J. The main error assigned by the plaintiff in error in this case is, that the court erred in charging the jury as follows: "You have heard, gentlemen of the jury, the evidence as to the sort of weapon the assault was made with; and if you believe that it was a weapon in its nature and of a sort that was likely to produce death, then the law presumes that that assault was made with the intent to murder. I say the law presumes; that is, the law raises the presumption, from the use of a weapon likely to produce death, that it was done with the intent to murder. And if you believe from the evidence that an assault was made by this defendant, and with such

a weapon, then, as I say, the law raises the presumption that it was done with intent to murder; and if that presumption is not rebutted by evidence upon the part of the defendant, the presumption that the law raises remains." This, in our opinion, was manifest error. We know of no case decided by this court that sustains this charge. The nearest case which approaches it is that of *Collier v. State*, 89 Ga. 31; 99 Am. Dec. 449. In that case this court held that if a man shoot with a pistol at another, and hit him, the law would presume *prima facie* that he did it with malice; that no one has a right to shoot at another with a loaded pistol in sport, and if he does so, he is responsible for the consequences, and the law will imply malice from the recklessness of the act.

Where death takes place from unlawful violence, malice includes an intention to kill: Code, sec. 4321. But where death does not take place, there may be malice in giving the wound, but utter absence of intention to kill. The law will impute the intention to kill where there is a killing, but not where there is none. Malice in an assault by stabbing does not necessarily include an intention to kill. Malice may prompt or attend any injurious act whatever. It is a necessary ingredient, for instance, in libel, malicious mischief, and malicious prosecution. The general definition of malice is, "wickedness of purpose; a spiteful or malevolent design against another; a settled purpose to injure or destroy another": *Burrill's Law Dict.* 698. From the use of a deadly weapon in a manner calculated to injure, the law will presume an intention to injure; or from the use of it, with intention to kill, in a manner calculated to accomplish the intention, the law will presume that, had the killing taken place, the homicide would have been murder. But this is as far as the mere legal presumption as to malice or intent will go, on trials for assault with intent to murder. That an effect not produced, and which if produced would have constituted a different offense from that actually committed, was intended, is surely for determination by the jury as a matter of fact. The law, without the aid of the jury, can presume the malicious motive or the intention, so far as realized in the act, but not an intention beyond what was so realized.

See also *Hogan v. State*, 61 Ga. 43, where the point involved in the present case was considered. In *Kinsabrew v. State*, 80 Ga. 222, the question as to presumptions of law and presumptions of fact was extensively discussed, and the rule properly

laid down by the present chief justice. Under the rule therein stated, this charge was error. It would have been a proper charge for the court to have instructed the jury that if the accused assaulted the person wounded with a weapon likely to produce death, and if death had ensued it would have been murder, then the law would presume that the assault was an assault with intent to murder. This is probably as far as the court should go in a case of this character; and we know of no direct decision in this state (nor of any other state in the Union) to the effect that the law presumes, because an assault was made with a weapon likely to produce death, that it was an assault with intent to murder. Where it takes a particular intent to constitute a crime, that particular intent must be proved to the satisfaction of the jury. It does not require direct or positive proof; but the circumstances must be such as would authorize the jury (and not the court) to infer the intent with which the act was done. In *Lawson on Presumptive Evidence*, p. 271, rule 66, it is laid down as the correct rule that "when a specific intent is required to make an act an offense, the doing of the act does not raise a presumption that it was done with the specific intent." Where one is charged with assault with intent to murder, and it is proved that he fired a loaded pistol at another, there is no presumption of law that he intended to murder the person thus fired at. In the cases of *Roberts v. People*, 19 Mich. 401, and *Maker v. People*, 10 Mich. 212, 81 Am. Dec. 781, we think the law is properly laid down by the court. It is there stated that the "general rule is well settled, to which there are few, if any, exceptions, that when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as a matter of fact, before a conviction can be had. But especially when the offense created by the statute, consisting of the act and the intent, constitutes, as in the present case, substantially an attempt to commit some higher offense than that which the defendant has succeeded in accomplishing by it, we are aware of no well-founded exceptions to the rule above stated, and in all such cases the particular intent must be proved to the satisfaction of the jury; and no intent in law, or mere legal presumption differing from the intent in fact, can be allowed to supply the place of the latter." We think the law is correctly stated in the cases referred to. See also *Wharton's Crim. Law*, 816; *Greenl. Ev.*, sec. 18, 17.

See, further, the following cases, which we have also examined: *Regina v. Smith*, 38 Eng. L. & Eq. 567; *Vandermark v. People*, 47 Ill. 122; *Callahan v. State*, 21 Ohio St. 306; *State v. Beaver*, 5 Harr. (Del.) 508; *State v. Malcolm*, 8 Iowa, 413; *Regina v. Jones*, 9 Car. & P. 109; *Regina v. Bourdon*, 2 Car. & K. 366; *Dunaway v. People*, 110 Ill. 333; 51 Am. Rep. 686; *Conn v. People*, 116 Ill. 458; *Kunkle v. State*, 32 Ind. 220; *Perry v. People*, 14 Ill. 496; *Rex v. Howlett*, 7 Car. & P. 274; *McCoy v. State*, 8 Ark. 451; *Cole v. State*, 10 Ark. 318; *Lacefield v. State*, 34 Ark. 275; 36 Am. Rep. 8; *Scott v. State*, 49 Ark. 156; *Trevino v. State*, 27 Tex. App. 372; *Moore v. State*, 18 Ala. 532; *Allen v. State*, 52 Ala. 391; *Meredith v. State*, 60 Ala. 441; *Crawford v. State*, 86 Ala. 16; *Lawrence v. State*, 84 Ala. 424; *Lane v. State*, 85 Ala. 11; *Oyletrees v. State*, 28 Ala. 698; *Morgan v. State*, 33 Ala. 418; *People v. Scott*, 6 Mich. 287; *Walker v. State*, 8 Ind. 290; *Smith v. Commonwealth*, 100 Pa. St. 324; *State v. Meadows*, 18 W. Va. 658. At the common law, in all cases where an assault with intent to do great bodily harm, or to kill or to murder, is charged, the intent with which the assault was made is always left by the English courts to the jury to determine: See the cases cited above. The rule may be said to be not only general, but universal; and however reluctant we may be to grant a new trial in this case, on account of the evidence as set out in the record, the sense of duty and obligation on our part to the law compels us to do so.

Judgment reversed.

ASSAULT WITH INTENT TO KILL. — To constitute the offense of an assault with intent to commit murder, a specific intent upon the part of the accused to take life is necessary: *People v. Mize*, 80 Cal. 42. And the specific intent to kill must be established to the full satisfaction of the jury: *Wood v. State*, 27 Tex. App. 393; *Hall v. State*, 9 Fla. 203; 76 Am. Dec. 617; *Maker v. People*, 10 Mich. 212; 81 Am. Dec. 781; *Simpson v. State*, 59 Ala. 1; 31 Am. Rep. 1. But in *Smith v. State*, 33 Ala. 23, it is decided that the specific intent to take life is not an essential ingredient of the offense, known as an assault with intent to murder. The intent to produce death is usually manifested by the use of a deadly weapon, although the crime may be committed without the use of such a weapon: *Monday v. State*, 32 Ga. 672; 79 Am. Dec. 314; but the law does not presume an intent to kill from the mere use of a deadly weapon, such as a loaded pistol: *People v. Mize*, 80 Cal. 42; *Scott v. State*, 49 Ark. 156; *State v. Hickam*, 95 Mo. 323; 6 Am. St. Rep. 54, and note. Yet the mere fact, unexplained, that the accused was unlawfully armed with a deadly weapon is a strong circumstance tending to show that he was actuated by malice, where he is charged with an assault upon the prosecuting witness with intent to murder him: *Steffy v. People*, 130 Ill. 98; *Trevino v. State*, 27 Tex. App. 372; *Wood v. State*, 27 Tex. App. 393; *Craw-*

Jord v. State, 25 Ala. 14. In a prosecution for an assault with intent to commit murder, the refusal of an instruction that the defendant might be convicted of a simple assault is proper, when the evidence shows that the assault consisted in shooting a pistol at the prosecuting witness: *People v. Macklin*, 76 Cal. 581.

HOWARD v. GLENN.

[25 GEORGIA, 232.]

CORPORATIONS—STOCKHOLDER, WHEN BOUND BY DECREE.—A decree of a court of competent jurisdiction in an action against a corporation by its creditors is binding upon a stockholder of such corporation, although he is a non-resident and not personally served with process, and though he never appeared or had notice of such suit.

CORPORATIONS—JURISDICTION OVER NON-RESIDENT STOCKHOLDERS.—A trustee appointed by the decree of a court of competent jurisdiction to maintain suit for the unpaid stock subscriptions to a corporation may sue non-resident stockholders who were not personally served with process, and who had no notice of the suit in which such decree was rendered.

CORPORATIONS—FRAUD OF CORPORATION NOT AVAILABLE AS DEFENSE TO STOCKHOLDER.—In an action by creditors of a corporation to collect unpaid subscriptions by a stockholder, the defense of fraud on the part of the corporation in inducing the stockholder to subscribe is unavailable.

CORPORATIONS—LIABILITY OF STOCKHOLDER FOR UNPAID SUBSCRIPTIONS.—A plea that a decree upon which suit by creditors to collect unpaid stock subscriptions to a corporation is based, provided that if the stockholders should pay a certain per cent upon their subscriptions within a certain time, this would be sufficient to pay off the indebtedness of the corporation, is not available to such stockholder if it fails to allege that he paid or offered to pay such per cent on his unpaid stock subscriptions.

CORPORATIONS—LIABILITY OF STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTIONS.—A stockholder of a corporation is liable to its creditors upon his unpaid stock subscription, and the fact that other stockholders may have been released as to their subscriptions by a decree of court is no defense to him, unless such action increased his liability.

CORPORATIONS—CHANGE OF NAME OF CORPORATION WILL NOT RELIEVE ADMITTED STOCK SUBSCRIBER therein from liability to the creditors of the corporation for the amount remaining due on the stock subscribed by him.

CORPORATION—BOOKS AS EVIDENCE ON STOCK SUBSCRIPTION.—In an action by the creditors of a corporation to recover the amount due by a subscriber to its stock, proof that the corporation to the stock of which such stockholder admittedly subscribed is the same as that in the name of which suit is brought makes the books of such corporation admissible as evidence as to the amount and value of his subscription, or of any other transaction between him and such corporation.

FRACTION—ADMISSION BY PLEA AS EVIDENCE.—A plea bearing on the main issue in the case, and containing an admission by defendant calculated

to damage his case, has the effect of making such admission evidence against him upon the trial of any other plea in the same case.

PRACTION—ADMISSION BY PLEA, WHEN ADMISSIBLE AS EVIDENCE.—

In an action by the creditors of a corporation to recover from a stockholder therein the amount of his unpaid stock subscription, the main issue being whether or not he was a subscriber, and one of his pleas admitting that he did subscribe to the stock of a corporation proved to be the same as that in the name of which suit is brought, such admission can be used as evidence against him in the trial of the other pleas.

F. H. Miller and W. K. Miller, for the plaintiff in error.

Calhoun, King, and Spalding, and C. H. Cohen, for the defendant in error.

BLANDFORD, J. At the appearance term the defendant filed a motion to dismiss the plaintiff's declaration, on the ground that he failed to annex a copy of the written terms of subscription, and copies of the proceedings referred to in his declaration, with a copy of the call for the enforcement of which this action was brought. Subject to this motion the defendant pleaded,—1. That the National Express and Transportation Company was not, on the fourteenth day of December, 1880, a body politic and corporate, as alleged in the plaintiff's declaration; 2. That the plaintiff is not a legally appointed trustee, and authorized to institute this action by virtue of his appointment; 3. That if the defendant ever subscribed to stock, it was to the National Express Company, whose charter was amended without the knowledge or sanction of this defendant; 4, 5, 6. The statute of limitations. When this case came on to be tried, the court ordered these pleas stricken, and overruled the motion to dismiss the plaintiff's declaration.

1. In our opinion, the plaintiff's declaration set forth a cause of action against the defendant. The declaration substantially alleged that Howard was a subscriber to the National Express and Transportation Company for fifteen shares of its capital stock, amounting to the sum of fifteen hundred dollars; that this company, having become insolvent, made an assignment to certain persons as trustees; that certain creditors of this company filed a bill in the city court of Richmond, upon which there was a decree rendered, praying that the defendant in error, Glenn, should be appointed a trustee, with authority to sue and collect from the corporators of the National Express and Transportation Company a certain assessment and call made upon them by the decree of that court. The officers or persons representing the National Express and

ford v. State, 25 Ala. 14. In a prosecution for an assault with intent to commit murder, the refusal of an instruction that the defendant might be convicted of a simple assault is proper, when the evidence shows that the assault consisted in shooting a pistol at the prosecuting witness *People v. Macklin*, 76 Cal. 561.

HOWARD v. GLENN.

[25 GEORGIA, 232.]

CORPORATIONS—STOCKHOLDER, WHEN BOUND BY DECREE.—A decree of a court of competent jurisdiction in an action against a corporation by its creditors is binding upon a stockholder of such corporation, although he is a non-resident and not personally served with process, and though he never appeared or had notice of such suit.

CORPORATIONS—JURISDICTION OVER NON-RESIDENT STOCKHOLDERS.—A trustee appointed by the decree of a court of competent jurisdiction to maintain suit for the unpaid stock subscriptions to a corporation may sue non-resident stockholders who were not personally served with process, and who had no notice of the suit in which such decree was rendered.

CORPORATIONS—FRAUD OF CORPORATION NOT AVAILABLE AS DEFENSE TO STOCKHOLDER.—In an action by creditors of a corporation to collect unpaid subscriptions by a stockholder, the defense of fraud on the part of the corporation in inducing the stockholder to subscribe is unavailable.

CORPORATIONS—LIABILITY OF STOCKHOLDER FOR UNPAID SUBSCRIPTIONS.—A plea that a decree upon which suit by creditors to collect unpaid stock subscriptions to a corporation is based, provided that if the stockholders should pay a certain per cent upon their subscriptions within a certain time, this would be sufficient to pay off the indebtedness of the corporation, is not available to such stockholder if it fails to allege that he paid or offered to pay such per cent on his unpaid stock subscriptions.

CORPORATIONS—LIABILITY OF STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTIONS.—A stockholder of a corporation is liable to its creditors upon his unpaid stock subscription, and the fact that other stockholders may have been released as to their subscriptions by a decree of court is no defense to him, unless such action increased his liability.

CORPORATIONS—CHANGE OF NAME OF CORPORATION WILL NOT RELIEVE ADMITTED STOCK SUBSCRIBER therein from liability to the creditors of the corporation for the amount remaining due on the stock subscribed by him.

CORPORATION—DECREE AS EVIDENCE ON STOCK SUBSCRIPTION.—In an action by the creditors of a corporation to recover the amount due by a subscriber to its stock, proof that the corporation to the stock of which such stockholder admittedly subscribed is the same as that in the name of which suit is brought makes the books of such corporation admissible as evidence as to the amount and value of his subscription, or of any other transaction between him and such corporation.

FRACTION—ADMISSION BY PLEA AS EVIDENCE.—A plea bearing on the main issue in the case, and containing an admission by defendant calculated

to damage his case, has the effect of making such admission evidence against him upon the trial of any other plea in the same case.

PRACTICE—ADMISSION BY PLEA, WHEN ADMISSIBLE AS EVIDENCE.—

In an action by the creditors of a corporation to recover from a stockholder therein the amount of his unpaid stock subscription, the main issue being whether or not he was a subscriber, and one of his pleas admitting that he did subscribe to the stock of a corporation proved to be the same as that in the name of which suit is brought, such admission can be used as evidence against him in the trial of the other pleas.

F. H. Miller and W. K. Miller, for the plaintiff in error.

Calhoun, King, and Spalding, and C. H. Cohen, for the defendant in error.

BLANDFORD, J. At the appearance term the defendant filed a motion to dismiss the plaintiff's declaration, on the ground that he failed to annex a copy of the written terms of subscription, and copies of the proceedings referred to in his declaration, with a copy of the call for the enforcement of which this action was brought. Subject to this motion the defendant pleaded,—1. That the National Express and Transportation Company was not, on the fourteenth day of December, 1880, a body politic and corporate, as alleged in the plaintiff's declaration; 2. That the plaintiff is not a legally appointed trustee, and authorized to institute this action by virtue of his appointment; 3. That if the defendant ever subscribed to stock, it was to the National Express Company, whose charter was amended without the knowledge or sanction of this defendant; 4, 5, 6. The statute of limitations. When this case came on to be tried, the court ordered these pleas stricken, and overruled the motion to dismiss the plaintiff's declaration.

1. In our opinion, the plaintiff's declaration set forth a cause of action against the defendant. The declaration substantially alleged that Howard was a subscriber to the National Express and Transportation Company for fifteen shares of its capital stock, amounting to the sum of fifteen hundred dollars; that this company, having become insolvent, made an assignment to certain persons as trustees; that certain creditors of this company filed a bill in the city court of Richmond, upon which there was a decree rendered, praying that the defendant in error, Glenn, should be appointed a trustee, with authority to sue and collect from the incorporators of the National Express and Transportation Company a certain assessment and call made upon them by the decree of that court. The officers or persons representing the National Express and

Transportation Company were made parties defendant to that bill. We think, so far as Howard had any interest in this company, that he was represented by the corporation in that case, and that he was bound by the decree rendered in the same (it being rendered by a court of competent jurisdiction), notwithstanding that Howard may at the time have been a citizen of Georgia, and may not have been served with any process in that case. So we think the court did right to overrule the demurrer of defendant to the plaintiff's declaration. We think, also, that the pleas, 1, 2, and 3, and 4, 5, and 6, were properly dismissed, on demurrer, by the court. We think that Glenn was duly appointed a trustee, and as such had a right to bring this suit; and that if the defendant subscribed to stock in the National Express Company, although the charter may have been amended without his knowledge or sanction, so as to make it the National Express and Transportation Company, this did not relieve the defendant from any liability to pay up his unpaid stock, this not being such a material alteration of the charter as would relieve the defendant, Howard. And this court held, in *Glenn v. Howard*, 81 Ga. 383, 12 Am. St. Rep. 318, in this same case, that the statute of limitations did not apply to the same.

2. We think there was no error of the court in holding that the first plea of the defendant in this case was insufficient in that it alleged that the action brought by the plaintiff did not set forth the outstanding creditors for whose benefit the same was instituted, the decree of the court in Virginia having set forth such creditors; and we hold that that decree was binding on the defendant, Howard, as to all matters therein contained, if he was a corporator in the National Express and Transportation Company.

3. It is alleged as error that the court erred in striking the second plea of defendant, that the decree of the chancery court of the city of Richmond of December 14, 1880, set forth in the petition, was not such a contract of record as was binding upon him personally for any purpose, in that the court was without jurisdiction over him as a resident citizen of the state of Georgia, who was never served with process therein, who never appeared, or had notice thereof until the institution of this suit. We think that when the corporation was sued at the instance of creditors, and was duly served, Howard was bound as a corporator by any proceedings in that case, and that there was no error in striking the second plea.

4. We think the third plea was also properly stricken by the court, inasmuch as we think that whatever fraud may have been committed by the corporation would not operate to defeat an action by the creditors of the corporation, however it might be as between the corporation and a corporator. Persons who gave credit to this corporation would not be bound by any fraud between the corporation and the corporators. As between the corporation and a corporator, such defense may or may not have been good; but as between a trustee appointed by a court to bring suit and collect the unpaid subscriptions of a corporator, no such defense could be made.

5. We think the fourth plea was properly stricken on demurrer, in this, that while it alleged the decree of the court in this case in Virginia, to the effect that if the stockholders should pay a certain per cent upon their subscriptions within a certain time, this would be sufficient to pay off the indebtedness of the company, the plea did not allege that there was any tender or offer on the part of defendant to pay under that decree, within the time therein prescribed, the amount prescribed to be paid. To avail himself of that decree, the defendant should have paid, or have offered to pay, the amounts specified in the decree. No such allegation appears in this plea, and therefore it was properly stricken.

6. It is complained that the court erred in striking the fifth plea, or so much thereof as alleged that the subscription was induced by fraud, and is void for false and fraudulent representations made, and for the fraudulent suppression of material facts concerning said company; the court allowing the words to stand in said plea, that defendant at no time became a subscriber to the National Express and Transportation Company; that he did sign a paper subscribing to the National Express Company for fifteen shares of the capital stock. Whether Howard became a stockholder in this company by subscription which was induced by fraud practiced upon him or not, if he did become a stockholder in said company, he is liable to the creditors of the company for so much of his unpaid stock as might be necessary to pay the company's debts, taken in connection with the other corporators of the company. And whether fraud was practiced upon him or not would make no difference as to the creditors; it would be a question between him and the corporation, with which the creditors had nothing to do. So we think the court

committed no error in striking that portion of the fifth plea complained of. We think the sixth plea was properly stricken, for the reasons stated in justification of the court in striking a portion of the fifth plea.

7. In the seventh plea, which was also stricken by the court, it is alleged that the plaintiff had settled with and released from liability several stockholders under said decree, and defendant contends that this is equivalent to a release of himself. We think the court properly struck this plea. The defendant is bound to the creditors upon his subscription to the capital stock of this company, and whether other stockholders were released or not is a matter with which he has no concern, unless this action on the part of the creditors or their agent increased his liability.

8. For the same reason we think the court was right in striking the eighth plea which is complained of, and also the ninth plea. When the plaintiff below showed that he had been duly appointed a trustee, by a court having competent jurisdiction, to recover of the stockholders of this company their unpaid subscriptions, for the purpose of paying off the creditors of the corporation, and when the plaintiff showed that defendant was a stockholder, and had subscribed so many shares to the capital stock of this company, and that the court had made an assessment upon the stockholders for a certain per cent upon the stock subscribed, and authorized him to sue and collect the same, we think he made out a case which entitled him to recover, notwithstanding any fraud which might have been practiced upon the stockholder to procure his subscription to the capital stock of this company by the corporation or its agents. Fraud thus practiced upon the subscriber was a matter which did not affect the creditors of the corporation.

The great question in this case is, whether the defendant, Howard, who is now the plaintiff in error, was a corporator and a subscriber to the capital stock of this company. He admits by his plea that he did subscribe to fifteen shares of the capital stock of the National Express Company; and it was shown by the evidence introduced by the plaintiff in the court below, that the National Express Company and the National Express and Transportation Company were one and the same. A mere change in the name of a corporation we do not think makes any material difference; clearly not such a differ-

ence as would relieve a subscriber from liability to pay for stock subscribed by him.

9. It is insisted that the court erred in allowing the books of the corporation to be put in evidence for the purpose of showing that the defendant did subscribe to fifteen shares of stock, and to show also certain other things therein contained. When it was shown that the defendant was a stockholder in the company, then the books of the company were admissible in evidence against him. But when this fact is not shown, we are of the opinion that the books of the company would not be admissible in evidence against him. In this case, however, it was admitted by the plaintiff in error that he did subscribe to so many shares of stock in the National Express Company; so when it was proved that the National Express Company and the National Express and Transportation Company were one and the same corporation, we think the books were admissible in evidence, not only to show that Howard was a stockholder, the number of shares, and the value thereof he subscribed for, but to show any other transaction that had taken place between him and this company. We are aware that it has been held that the books of a corporation are admissible to show *prima facie* that the defendant was a subscriber to the stock of the company, and was a stockholder therein; but while we do not think this ruling is correct upon any reason or principle known to us, yet under the facts of this case, we think the books were properly admitted in evidence. We know of no decision, however, which shows, upon principle, that such books are admissible without some special circumstance. We do not think that the case of *Turnbull v. Payson*, 95 U. S. 418, a decision by Judge Clifford, to the effect that the books of a corporation are admissible in evidence to show that a person is a stockholder, is correct. No reason is assigned in that decision, and none has been assigned in any decision which we have been able to find in either North Carolina or Alabama. But we think, under the facts of this case, where the defendant admitted that he was a subscriber to the stock of the National Express Company, and where it was shown that the National Express Company and the National Express and Transportation Company were one and the same thing, that the books were properly admitted. We think, furthermore, that when the subscription list was tendered, and admitted in evidence by the court below, the plaintiff in error had a right to show that he did not subscribe to this list; and

therefore think the court committed error in refusing to allow him to make such proof. Yet we do not think this is reversible error, inasmuch as it appears from the record, without more, that the plaintiff had a right to recover in this case. So, upon considering this case, we are of the opinion that there was no material error committed by the court below, and that the finding of the jury was right, under the facts in proof.

10. It is contended by the plaintiff in error that the admission in the fifth plea, to the effect that he had never subscribed to the National Express and Transportation Company, but that he did subscribe fifteen shares to the National Express Company, could not be used as an admission against him upon the trial of any other plea than that; and the case of *Glenn v. Sumner*, 182 U. S. 156, is cited as authority to sustain this position. In the present case the main issue was, whether the plaintiff in error was a subscriber to the stock of the National Express and Transportation Company. It was affirmatively alleged in the declaration that he was; and if he was such subscriber, his liability, under the facts of the case, was clear and unmistakable. We think this allegation in the plaintiff's declaration, that he was such subscriber, called forth from him a clear and explicit denial of the same by a plea of *non est factum*, as was strongly hinted at by the supreme court of this state in the case of *Thornton v. Lane*, 11 Ga. 489. This was the main issue in the case, and without a determination of the same against the plaintiff, the plaintiff was entitled to judgment. So we think that a plea which denies that the defendant was a subscriber to this company, but which at the same time admits that he was a subscriber to another company (which two companies were one and the same), was evidence against the defendant (now plaintiff in error), and might be so used as an admission. While we admit that under the laws of this state a defendant may file as many contradictory pleas as he thinks proper, yet if one of those pleas bears on the main issue in the case, and there be an admission in the same by the defendant which is calculated to damage his cause, that admission may be used in evidence against him. In fact, the only issue to be determined by the jury in this case was, whether Howard became a subscriber and stockholder in this company, and any plea which bore upon that issue, and which contained admissions by the defendant, could be used against him. So we think

that in the case of *Glenn v. Sumner*, 132 U. S. 156, what was said by the judge in delivering the opinion therein, to the effect that statements made for the purpose of presenting the issue to which they relate are not evidence upon any other issue in the same record, does not apply to this case.

Judgment affirmed.

CORPORATIONS. — For a thorough and complete discussion of the liability of stockholders to the creditors of a corporation for the corporate debts, wherein is considered the question of unpaid subscriptions, see extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806-873.

TIMOTHY v. CHAMBERS.

[85 GEORGIA, 237.]

HOMESTEAD SOLD WITHOUT LEAVE MAY BE RECOVERED THROUGH PROCEEDS ENJOYED — MEANE PROFITS SET OFF. — Where husband and wife sold and conveyed homestead land secured under the constitution of 1868, with no leave so to do, that the beneficiaries of the homestead used and enjoyed the proceeds of the sale will not bar a recovery of the land, but money thus used and enjoyed may be set off against meane profits for which the purchaser is liable.

HOMESTEAD SOLD WITHOUT LEAVE MAY BE RECOVERED — WIFE'S WARRANTY DEED NOT ESTOPPEL. — The wife's deed, with or without warranty, if it has no effect as a conveyance of title, will not estop her as to her interest in the homestead premises in an action to recover the land on the homestead right. Though she may be bound to respond to her warranty, her own property, not the homestead itself, must be looked to for satisfaction.

HOMESTEAD, PRESUMPTION IN FAVOR OF REGULARITY OF PROCEEDINGS TO OBTAIN. — Liberal presumptions are indulged in favor of the regularity of homestead proceedings. A proper order to the surveyor will be presumed, where the ordinary has approved the plat returned to him; and approval of the "homestead" means, substantially, approval of the plat and the schedule conformably to section 2009 of the Georgia code.

HOMESTEAD, SUFFICIENCY OF SURVEYOR'S AFFIDAVIT OF PLAT OF. — The surveyor's affidavit that the plat "is a correct plat" means, in substance, that the land is correctly platted and laid off, and is a sufficient affidavit under section 2008 of the Georgia code.

HOMESTEAD, REGISTRATION OF PLAT OF. — The law does not require the plat to be recorded in the county in which the land lies, but only in the county in which the jurisdiction to secure the homestead is exercised; Georgia code, section 2009.

SUIT by R. G. Chambers and wife, Eliza, for the use of the wife and minor children, against A. R. Elliott and others, for a tract of land in Madison County claimed as a homestead, and for rents to January 1, 1885. Defendants pleaded the general issue, and also that in 1884 said land was conveyed by Cham-

bers and wife to Elliott for a consideration of one thousand dollars, its full value; that plaintiffs have received the full benefit of the full value of the property claimed as a homestead, and that therefore the sale to defendants should be confirmed and plaintiffs decreed to pay them the money thus received, before any judgment for the land or interest therein is entered in favor of plaintiffs; that Chambers and wife had by deed conveyed their interest in the land to Elliott, and thereby passed any interest which the wife might have as beneficiary, and if any recovery can be had in this action it is only the homestead interest of the minor children; that the interest of plaintiffs, if any, can be estimated in money, and the interest of all parties protected by giving plaintiffs a certain interest in fee, the remainder to defendants, who pray judgment for such division of the property. All of the pleas except that of the general issue were stricken out. On the trial it appeared that in 1869 Chambers held the land by deed describing it as lying in Madison County. Chambers's petition for a homestead under the constitution of 1868 was introduced. It set forth that he was a resident of Elbert County, the head of a family consisting of himself, wife, and three minor children, and that he desired the said land set apart as a homestead out of land lying in the counties of Madison and Hart; he therefore prayed an order directed to the county surveyor of Madison County, directing him to lay off, plat, and value such realty, etc. This petition was duly filed and recorded in the office of the clerk of the superior court for Elbert County October 12, 1875. Plaintiffs also introduced a plat of 179 acres of land, with an affidavit of the county surveyor of Madison County, executed on October 25, 1875, that the plat was a correct one of that amount of land surveyed by him for Chambers as a homestead, etc., all of which was recorded in the office of the clerk of the superior court for Elbert County on July 6, 1883. The homestead was approved by the ordinary of Elbert County October 27, 1875. Chambers testified that the land covered by the deed to him, and by the plat attached to the homestead papers, is the land in dispute, and the same that was laid off to him as a homestead in 1875; that he remained in possession thereof until 1884, when he delivered the same to Elliott, who kept it until he assigned to another; that the rental value of the land was \$150 per annum; that one child had been born to him since the homestead was taken, that another had attained majority,

and that his wife and three minor children are beneficiaries; that both his wife and himself signed the deed to Elliott to this land, February 29, 1884; and that the latter paid the consideration mentioned, one thousand dollars, for it. Verdict for plaintiffs for a homestead interest in the premises, and against Elliott for two hundred dollars rents for the years 1885, 1886, 1887, 1888, and that defendants deliver to plaintiffs the rent notes for 1889. A motion for a new trial was overruled, and defendants excepted and appealed.

J. P. Shannon, J. J. Strickland, D. W. Meadow, and Harrison and Peebles, for the plaintiffs in error.

McCurry and Proffitt, for the defendants in error.

BLECKLEY, C. J. 1. The plea that the defendant Elliott had purchased the premises, paid their full value, and that the amount thus paid had been enjoyed by the beneficiaries of the homestead, was not restricted to the mesne profits, but was set up as a defense to the whole action. The homestead provided for by the constitution of 1868 was unlike the exemption which the constitution of 1877 provides for. The former embraced realty as such, and personalty as such; whereas, the latter may, as to the whole value exempted, cover one or the other, or both, indifferently. In the scheme of the former, money paid for land unlawfully sold would not take the place of the land,—certainly not unless invested in land and still held in that form. But money would pay rent, and we think it might be set off against mesne profits of the homestead land, if the family got the benefit of the money paid by Elliott as purchase-money. Though the plea was properly stricken because it sought to bar the action instead of merely resisting the collection of mesne profits, we direct that the recovery of mesne profits be opened, if the defendants shall, when the *remittitur* is returned and entered, plead this matter as against mesne profits alone. If they fail to do this promptly, this direction will count for nothing. Of course they must prove, as well as plead, in order to make the set-off effectual.

2. The plea which sought to estop the wife by her deed and warranty was no defense as against her interest in the homestead. She may be liable upon the warranty, but if so, her liability thereon could not be enforced, directly or indirectly, against her homestead interest. Nothing of the sort was attempted in *Amos v. Cosby*, 74 Ga. 793. In that case the action

was on the warranty itself, the breach of which consisted in not protecting the land against encumbrances superior to the homestead right. No point was made on the validity of the sale and conveyance of the homestead property. Here the point is made, and surely the wife's warranty that she, in connection with her husband, had the right to sell, would neither create the right nor bar her from denying its existence. If it would, the whole scheme of our law in restraining and regulating the sale of homestead and exempt property would be broken up.

3, 4, 5. The head-notes complete the opinion.

Judgment affirmed, with direction.

HOMESTEAD — ALIENATION BY DEED. — No operative conveyance or effectual release of the homestead can be made, unless the mode pointed out by the statute is pursued by reasonable strictness: *Sharp v. Bailey*, 14 Iowa, 387; 81 Am. Dec. 489; note to *Pool v. Gerrard*, 65 Am. Dec. 482-489. Compare note to *Alt v. Bankholder*, 12 Am. St. Rep. 683-686; *Lubbock v. McMann*, 83 Cal. 226; 16 Am. St. Rep. 108, and note.

HILL v. WESTERN UNION TELEGRAPH COMPANY.

[85 GEORGIA, 425.]

TELEGRAPH COMPANIES — ASSENT OF SENDER OF MESSAGE TO CONDITIONS IN BLANK. — The sender of a telegraphic message who writes the same upon a blank which has printed upon it a condition that "the company will not be liable for damages in any case, where the claim is not presented in writing within sixty days after sending the message," is chargeable with knowledge of, and deemed to assent to, such condition.

TELEGRAPH COMPANIES — WAIVER OF CONDITION BY AGENT. — A demand for damages for mistake in the transmission of a telegraphic message is properly made upon the agent on duty at the place from which the message was sent, and though he is not bound to recognize an oral demand, still, if he does so, and makes no objection to it on the ground that it is not in writing, but objects to it on the sole ground that the company is not at fault, he thereby waives, on the part of the company, any right to have the demand made in writing, according to the condition attached to the message as sent.

ACTION to recover damages for mistake on the part of the telegraph company in transmitting a message.

Wright and Harris, for the appellant.

Bigby and Berry, and C. Rowell, for the appellee.

BLECKLEY, C. J. It was certainly a gross error to substitute \$6.25, in the dispatch delivered by the company, for \$250

in the dispatch as sent. Such an error, unexplained, is ample evidence, not only of negligence, but of gross negligence. The motion for a nonsuit which the court granted was based on the single ground that no demand or claim for damages had been made in writing within sixty days, as required by the rules and regulations of the company printed on the blank upon which the message was sent.

1. The rule referred to was in these terms: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." This was printed in small type at the head or top of the written message. And lower down on the same page were the words, also in small type: "Send the following message subject to the above terms, which are hereby agreed to." At the bottom of the page were the words, in large type: "Read the notice and agreement at the top." The point was made in argument that the rule as to the mode and time of presenting a claim for damages was not obligatory upon the sender of the message, because not agreed to by him, nor even known to him, according to the evidence, until after this suit was brought. According to the weight of authority in like or analogous cases, he could, by reasonable diligence, have been aware of this rule, and by writing and signing the message on the same page upon which the rule was set forth, he signified to the company both his knowledge of it and his assent to it: *Breese v. United States Tel. Co.*, 45 Barb. 274; affirmed in 48 N. Y. 132; 8 Am. Rep. 526; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; *Beasley v. Western Union Tel. Co.*, 89 Fed. Rep. 181; notes to *Gillis v. Western Union Tel. Co.*, 4 Lawyers' Ann. Rep. 611; 2 Shearman and Redfield on Negligence, 552.

2. It is also insisted that the rule is unreasonable, and for that reason not obligatory. We, however, think it reasonable, and many other courts have so considered it: *Greenhood on Public Policy*, 507; 2 *Thompson on Negligence*, 846, 9; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Heimann v. Western Union Tel. Co.*, 57 Wis. 562; *Cole v. Western Union Tel. Co.*, 33 Minn. 327; *Western Union Tel. Co. v. Meredith*, 95 Ind. 98; *Western*

Union Tel. Co. v. Jones, 95 Ind. 228; 48 Am. Rep. 713; *Western Union Tel. Co. v. Yopet*, 118 Ind. 249; *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. For analogous cases, see *Southern Express Co. v. Caldwell*, 21 Wall. 264; *Riddlesbarger v. Hartford F. Ins. Co.*, 7 Wall. 886; *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97; *Underwriters' Agency v. Sutherland*, 55 Ga. 266; *Greenhood on Public Policy*, 505.

But while we are of opinion that the telegraph company was entitled to have the claim for damages presented in writing within sixty days after the message was sent, we think that right could be waived, and that the evidence in the record tended to prove that it was waived, not indeed as to the time, but as to the mode, of making the demand. The evidence indicates that if any damage was sustained, it occurred in February, 1889, immediately after the telegram was sent. Wright, the sender of the message, who acted as agent and attorney for Hill, the plaintiff, testifies that about three weeks after the damage occurred, he went to Woodruff, the manager of the company's business at Rome, and told him that Hill had been damaged four or five hundred dollars, and that the company would have to pay Hill for the same. Woodruff said to wait awhile, and he would investigate and find where the blame rested. In about two weeks thereafter, Wright met Woodruff, and asked what the company would do about it. Woodruff replied that the company was not to blame, and that Hill would have to look to the operator in Cedartown for the damages. That it was competent to make the demand upon the agent of the company on duty at the place from which the telegram was sent was ruled by this court in *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480. The agent was not bound to recognize an oral demand. But if he did so, making no objection to it on the ground that it was not in writing, we think it was sufficient. So far from presenting this objection, the agent requested time for investigating the merits of the claim, and after investigating, put the company's refusal to pay, not upon any want of sufficiency in the demand, but upon the non-liability of the company. According to a report which appears in 118 Indiana, 249, the supreme court of Indiana ruled, in the case of *Western Union Tel. Co. v. Yopet*, that a waiver of written demand resulted from a refusal to pay, put by the agent on the ground that the contract to send and deliver the telegram was illegal

because made on Sunday. Though we find the case reported later, we have been unable to discover it in the Indiana Reports as decided on March 18, 1887, and reported in the book above referred to. Nevertheless we think the decision upon this question of waiver is sound on principle, and embodied a good exposition of Georgia law, whether it does so of Indiana law or not. To reach this holding, it is not necessary to differ from the St. Louis court of appeals in *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257. In that case it was held that the oral promise of a general agent of a telegraph company to look into the matter was not a waiver of the condition requiring a demand to be made in writing. Here the matter was looked into, a decision made, and the result communicated.

The court erred in not submitting the case to the jury, and in granting a nonsuit.

Judgment reversed.

TELEGRAPH COMPANIES — CONDITION AS TO THE PRESENTATION OF CLAIM WITHIN A CERTAIN TIME. — The authorities all agree that the stipulation on the telegraph company's blank, that it will not be liable for damages in any case where the claim is not presented in writing within a certain number of days after sending the message, is valid and binding: *Note to Camp v. Western Union Tel. Co.*, 71 Am. Dec. 471.

CHATTANOOGA, ROME, AND COLUMBUS RAILROAD COMPANY v. LIDDELL.

[85 GEORGIA, 482.]

NEGLECT — EVIDENCE. — In an action to recover damages against a railroad company for personal injury received through its negligence, evidence that plaintiff's nervous prostration in consequence of the injury had a weakening effect upon her system, and required the administration of opiates, from which she was acquiring the opium habit; that she did not now and never will take the pleasure previously taken by her in her household duties; and that from the effects of the nervous prostration, she has no energy to work or to enjoy society, — is admissible, not as an element of damages, but as an index to the pain and suffering of the plaintiff.

EVIDENCE — DECLARATIONS AS PART OF RES GESTA. — In an action against a railroad company to recover for personal injury, the declarations of the president of a construction company which was building and equipping the road, made two or three hours after the accident, and at another place, to a newspaper reporter, that it would be to his interest not to publish too much, that the road had been laid temporarily, that he had not had time to put the broad-gauge ties upon it, and that

he did not want public opinion too strong against him, are not admissible.

RAILROAD COMPANY, WHEN LIABLE FOR NEGLIGENCE OF LEASING CONSTRUCTION COMPANY. — Where a contract between a railroad company and a construction company permits the latter to operate the road and to receive its earnings for two years from the time of the making of the contract, the railroad company is liable for injuries inflicted through the negligence of the construction company during that period.

NEGLECT — MEASURE OF DAMAGES. — In an action against a railroad company to recover for personal injury, a finding of gross negligence against the company, without a finding of willful misconduct or an entire want of care raising a presumption of conscious indifference to consequences and the legal rights of others, will not authorize a verdict for exemplary or punitive damages. Such finding will only justify a verdict for compensatory damages.

NEGLECT — DAMAGES — INSTRUCTION. — In an action against a railroad company to recover for personal injury, an instruction that a finding of gross negligence against the company would entitle plaintiff to recover punitive damages as punishment of the railroad company is error, when the statute provides that such damages may be given "to deter the wrong-doer from repeating the trespass." The instruction should be given in the words of the statute.

PRACTICE — INSTRUCTION EXPRESSING OPINION, ERROR THROUGH LAPUS LINGUE. — In an action to recover damages for personal injury, an expression in a charge, "that these injuries are permanent, and that she will have to suffer the remainder of her life," omitting the word "if," is error, although it appears from the whole charge that the omission was a *lapse lingue*.

ACTION against a railroad company to recover for injuries to a passenger from the derailing of a passenger-coach on a defective track, through the negligence of such company. Verdict for plaintiff. A motion for a new trial was overruled, and defendant excepted and appealed.

Dabney and Fouché, for the plaintiff in error.

Dean and Smith, for the defendant in error.

SIMMONS, J. As this case is to be sent back for a new trial, we will not discuss the first three grounds of the motion, to wit, that the verdict is contrary to the evidence, to law, etc. The fourth ground of the motion was not insisted upon here.

1. The fifth, sixth, and eighth grounds of the motion complain that the court permitted a witness to testify that the plaintiff's nervous prostration had a weakening effect upon her system; that this injury had required the administration of opiates, and that the plaintiff was acquiring the opium habit as a result of this trouble, by reason of the administration of opiates; that the plaintiff had great pleasure in her

household duties, but she does not take that pleasure now and she never will; and that from the effects of this nervous prostration she has not got the energy to work, or to enjoy society, etc. Judging from the charge of the court, which is in the record, this evidence, and some other of like character, was admitted, not as an element of damage, but somewhat in the nature of an index to the pain and suffering of the plaintiff. Being admitted for that purpose, we cannot say it was error: *Powell v. Augusta etc. R. R. Co.*, 77 Ga. 192; *Texas etc. R'y Co. v. Douglas*, 78 Tex. 325.

2. The ninth ground of the motion complains that the court permitted a witness for the plaintiff to testify as follows: "Mr. J. D. Williamson came to where Mr. Outz and I were talking about the road. Mr. Williamson said it would be to his interest not to publish too much. They were speaking about the condition of the railroad, and Mr. Williamson said it was just put there temporarily; that he had not had time to put the broad-gauge ties on it, and he did not want public opinion so strong against him. He was talking about the hurried condition he had fixed up the road in, and did not want the public opinion too hard against him in the terrible wreck and smashing up people." We think the court erred in admitting this testimony. It was asserted by counsel in the argument before us, and not denied, that these sayings of Williamson were not made at the time the accident happened, but some two or three hours thereafter. Williamson was the president of the construction company which was building and equipping the road. While it is true that the construction company was operating the road in the transportation of passengers and freight, and while it is true that the railroad company was liable for the acts of the construction company (as we shall hold later on in this opinion), and that Williamson thereby became the agent of the railroad company, we do not think that these admissions made by him, under the circumstances disclosed by this record, were admissible as against the railroad company or the construction company. To make the admissions of an agent admissible as against his principal, they must be a part of the *res gestæ*, or must have been made during the performance of the agent's duties. It is clear that the admissions of Williamson were not made as part of the *res gestæ*. He was not at the place of the accident, and, as said before, it was some two or three hours after the accident when he had the conversation

with the newspaper reporter. And it is equally clear that they were not made when in the performance of a duty to the corporation, or while any duty to the corporation was being performed by him. It seems to us to have been more in the nature of an application to the newspaper reporter not to publish too much about the accident in his paper, and more in the interest of Williamson individually than of the railroad company. In the case of *Wright v. Georgia Railroad etc. Co.*, 84 Ga. 380, it was sought to prove that a brakeman said that the axle of the car which had run off was two inches too short, and that he had told the company so; and this court held that "beyond the scope of his agency, an agent cannot, by his declarations, affect his principal. And as corporate bodies, especially railroad companies, have daily hundreds of employees in various service, with divisions of labor and duty, simple justice requires that these companies shall not be liable for damages upon the loose or casual sayings of every person who may be in their employment." In the case of *Griffin v. Montgomery etc. R. R. Co.*, 26 Ga. 111, this court held that "the admissions of an agent, not made at the time when the fact transpires upon which it is sought to charge his principal, but subsequently, being no part of the *res gestæ*, should be excluded."

In the case of *Evans v. Atlanta etc. R. R. Co.*, 56 Ga. 498, an agent of a railroad made an indorsement on a bill of lading some days after the corn passed through Atlanta, and this court held that the indorsement of the agent was not admissible as evidence. On page 500, Jackson, J., in discussing the question, says: "If it was the duty of this agent to investigate how the freight was received, whether in good or bad order, and to report that fact on the bill of lading on inquiry by the agent at La Grange, then we think this indorsement would be made *dum fervet opus*, in the very work intrusted to him by the company; and being so made in the business he was employed to transact, his sayings, or writings, which are but written statements, would be admissible; but in the absence of proof that this was in the line of his business,—that it was his duty to investigate and report thereon,—the written statement on the bill of lading would be but the sayings of the agent in respect to a past transaction, and would not be admissible. In this case, the record does not disclose any proof that such investigation and report and indorsement was part of the business of this agent, and therefore the indorsement

was properly rejected. . . . These Georgia cases and our code confine the admissibility of the sayings of the agent to the business intrusted to him, and to the time while so employed, and exclude his sayings as to past transactions. In our state, they are admissible only upon the principle of being part of the *res gestæ*. It is clear, therefore, that the court rejected the indorsement of this agent, and of the other agents, properly, because they spoke or wrote about past transactions, and there was no proof that it was their business to investigate these transactions, and write or make statements about them." Mechem, in his work on agency, section 714, says: "The statements, representations, and admissions of the agent, made in reference to the act which he is authorized to perform, and while engaged in its performance, are binding upon the principal in the samemanner and to the same extent as the agent's act or contract under like circumstances, and for the same reason. While keeping within the scope of his authority and engaged in its execution, he is the principal, and his statements, representations, and admissions in reference to his act are as much the principal's as the act itself. Such statements, representations, and admissions are therefore admissible in evidence against the principal in the same manner as if made by the principal himself. But it is obvious from this statement of the rule that not every statement, representation, or admission which the agent may choose to make is binding upon the principal. In order to have that effect, the statement or admission must have been made,—1. In respect to a matter within the scope of his authority; . . . 2. The statements, representations, or admissions must have been made in reference to the subject-matter of his agency; the mere idle, desultory, or careless talk of the agent, having no legitimate reference to or bearing upon the business of his principal, cannot be binding upon the latter; and 3. The statements, representations, or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction. Or to use the common expression, they must have been a part of the *res gestæ*. If, on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible." As to what is embraced within the *res gestæ*, see section 715, and illustrations.

In the case of *Vicksburg etc. R. R. Co. v. O'Brien*, 119 U. S. 99, the court said: "It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*, — simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes — an appreciable period of time — after the accident cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness, — a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals."

Wood, in his *Practice Evidence*, section 171, says: "It is a well-settled rule of evidence that the declarations or admissions of an agent will bind the principal in respect to matters about which he was authorized to act for him, if made at the time of the transaction, so as to constitute a part of the *res gestæ* or in reference to a transaction not yet completed. . . . The mere rank or position of the person, as that he is general superintendent, general manager, general agent, etc., of the principal, is not, of itself, sufficient evidence of his authority to make the admission, unless it was made in reference to a transaction in which he participated, and under such circumstances as make it part of the *res gestæ*; consequently, except where made by the agent as and for the principal, and with competent authority, in order to be admissible, they must constitute a part of the *res gestæ*." See a full discussion of the subject in this section.

But it is claimed by counsel for the defendant in error that this testimony was admissible under the decision in the case of *Krogg v. Atlantic etc. W. P. R. R. Co.*, 77 Ga. 202; 4 Am. St. Rep.

79. While in my opinion that case goes to the extreme limit, yet we do not think it would authorize the admission of the evidence now under consideration. That decision was put expressly upon the ground that the admissions of Gabbett (the superintendent) were part of the *res gestæ* of the transaction, and that they were made while in the performance of a duty which he owed to the company. And it will be seen from reading that case that the admissions were made by Gabbett to the engineer while the examination into the cause of the wreck was going on; and the court therefore held them admissible. The court say: "His statements as to the condition of the road were made while in the line of his duty. . . . It was Gabbett's duty to investigate the cause of this disaster, and while he was pursuing his inquiries, actually thus engaged, he made the statement to Krogg already set out. . . . If the agent be in the performance of a duty of the corporation, while thus performing that duty, what he says as to any defect in the construction of the road is *res gestæ* as to such defect, and his admissions are the admissions of the corporation." It will thus be seen that the facts of that case are very different from the facts in this case. Here, Williamson was not in the performance of any duty which he owed to the company. Nor does it appear that he was investigating the cause of the accident, as Gabbett was. All that appears is, that he was asking the newspaper man "not to be too heavy on the railroad." For these reasons, we think the court erred in admitting these statements of Williamson.

3. The tenth ground of the motion complains of the following charge of the court: "In this contract I find this language: 'It is further contracted and agreed that the said C. M. Hillman and his successors and assigns shall operate said railroad so to be completed and equipped, for and during the term of two years from and after this date, and he and they obligate themselves,' and so on. And further on it is stipulated that they are to receive the earnings of the road. I charge you that, under the language of that contract, the defendant in this case would be responsible for any damages that might accrue from the operating of the railroad; for it is clearly indicated in the contract that they were to operate the road, and receive the earnings thereof. Or if I am wrong in that construction of the contract, and if you believe from the evidence the contract was, — or if there is any question about that, — and it is the duty of the court to construe that contract, and I do construe it

to mean that they have the authority to operate this road, and carry passengers under and by virtue of the franchise of the Chattanooga, Rome, and Columbus Railroad Company, the defendant in this case; and if the evidence discloses that they were operating it with their knowledge, and if they did not put the public on notice that they did not have the right to carry passengers, they would be liable for any injury that might occur by reason of the negligence of the construction company in carrying passengers." We see no error in this part of the charge. The contract between the railroad company and the construction company allowed the construction company to operate the road, and to receive its earnings for two years from the time of the making of the contract. In the case of *Macon & A. R. R. Co. v. Mayes*, 49 Ga. 855, this court held that "where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has intrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars." See also *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464; 48 Am. Rep. 574; *Washington etc. R. R. Co. v. Brown*, 17 Wall. 450; *Abbott v. Johnstown etc. R. R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572; *Lakin v. Willamette Valley and Coast R. R. Co.*, 18 Or. 436; 57 Am. Rep. 25.

4. There was no error in the charges of the court as complained of in the eleventh, twelfth, and thirteenth grounds of the motion, when taken in connection with the whole charge.

5. The fourteenth ground of the motion complains that the court erred in charging that "if the evidence discloses, from all the facts that have been submitted to you, that this railroad was grossly negligent, then plaintiff would be entitled to recover what we call punitive damages, to punish them for that negligence; and there is no measure of damages, then. It is for you to say, from all the facts and circumstances that surround the case, to what extent you ought to add to your verdict for this plaintiff, to punish them." We think the court erred in this charge to the jury. In the case of *Milwaukee etc. R. R. Co. v. Arms*, 91 U. S. 489, the supreme court of the United States held: "1. A passenger in a railway car, who has been injured in a collision caused by the negligence of the employees of the company, is not, as a general rule, entitled, in an action against the company, to recover damages beyond the limit of compensation for the injury actually sustained.

2. Exemplary damages should not be awarded for such injury, unless it is the result of the willful misconduct of the employees of the company, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them." The court, in discussing the question, say: "'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train, and the court therefore misdirected the jury." Wood, in his notes to Addison on Torts, volume 2, page 646, says: "In order to warrant a jury in giving vindictive damages, something more than mere unlawfulness must be shown; there must be evidence either of malice, fraud, wantonness, or oppression. The act must have been done under such circumstances as show a disregard for the rights of others, or an intention to set at defiance the legal rights of others, or the ordinary obligations of society." Under these rules, which seem to us to be sound, we do not think the evidence of negligence in this case was sufficient to authorize the court to charge the jury that they might find punitive damages. Even if it was, we would still hold, under the rulings of this court, that the charge of the trial judge was erroneous. The code, section 3066, says: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." In the case of *Ratteree v. Chapman*, 79 Ga. 574, this court held that it was error to charge the jury that they "may give exemplary damages, not only as compensation for the wounded feelings of the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses." The

judge in the present case charged that exemplary damages might be given as a punishment of the railroad company, while the code says they may be given "to deter the wrong-doer from repeating the trespass." As we said in the Ratteree case, "It is best that the law of the case, when expressed in the code, be given as expressed, in charge to the jury." Under the code, the damages are not given as a punishment, but are given to deter the wrong-doer from repeating the trespass.

6. The fifteenth ground of the motion complains that the court erred in expressing his opinion to the jury that the injury was permanent. It seems that this complaint is well founded, because the court says: "I charge you again, that these injuries are permanent, and that she will have to suffer the remainder of her life." It appears from a reading of the whole charge that this was a *lapsus linguæ*. The whole charge shows that the judge intended to use the word "if"; so it would read, "I charge you again, that if these injuries are permanent," etc. But the charge complained of in this ground of the motion is certified to by the trial judge, so we will simply say that we know he will correct it in his next charge to the jury.

Judgment reversed.

NEGLIGENCE—PERSONAL INJURY—EVIDENCE.—Under the proper allegations in the complaint for personal injuries received through defendant's negligence, the plaintiff may prove the nature and extent of such injuries: *Wheatsville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865.

EVIDENCE—DECLARATIONS—RES GESTÆ.—While the *res gestæ* are those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act, still these incidents must stand in immediate casual relation to the act; *Ward v. White*, 86 Va. 212; 19 Am. St. Rep. 883. Declarations not made at the time of the accident, which do not explain the manner in which it occurred, are not concurrent with the injury, nor uttered contemporaneously with it so as to be regarded as part of the principal transaction, are not admissible as part of the *res gestæ*: *Chicago etc. R'y Co. v. Becker*, 128 Ill. 545; 15 Am. St. Rep. 141. Declarations as to defects in machinery and appliances made by the officers of a railroad company, after the accident, are not part of the *res gestæ*: *Erie etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895; note to *People v. Vernon*, 95 Am. Dec. 73-75.

RAILROAD COMPANY, WHEN LIABLE FOR INJURIES INFLICTED BY A CONSTRUCTION COMPANY.—A railroad company is liable for the negligence of contractors engaged in constructing its road: *Chicago etc. R. R. Co. v. McCarthy*, 20 Ill. 385; 71 Am. Dec. 285, and note. But see *Owningham v. International etc. R. R. Co.*, 51 Tex. 503; 32 Am. Rep. 632, and foot-note; *Miller v. Minnesota etc. R'y Co.*, 76 Iowa, 655; 14 Am. St. Rep. 256, and note. A city railway company is liable for negligence in leaving rails pro-

jecting beyond a temporary barrier inclosing the track which is being laid, although the negligence was that of the contractor: *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335; 14 Am. St. Rep. 427. A railroad, no matter who owns it, is charged with every duty to the public imposed upon it by its charter and the nature of its business, and from such obligations it cannot escape without legislative permission, so long as its corporate existence continues, no matter if it is leased or otherwise controlled and operated by another person or corporation: *Gulf etc. R'y Co. v. Newell*, 73 Tex. 334; 15 Am. St. Rep. 788; *Harmon v. Columbia etc. R. R. Co.*, 28 S. C. 401; 13 Am. St. Rep. 686, and note; *Naglee v. Alexandria etc. R'y Co.*, 83 Va. 707; 5 Am. St. Rep. 308, and note 313-316; *Chollette v. Omaha etc. R. R. Co.*, 26 Neb. 159; *Acker v. A. & F. R. R. Co.*, 84 Va. 648; *International etc. R. R. Co. v. Moody*, 71 Tex. 614; *Backus v. Detroit etc. R'y Co.*, 71 Mich. 645.

EXEMPLARY DAMAGES — PERSONAL INJURIES. — Exemplary damages are not recoverable as a matter of right, but are given to stamp condemnation upon acts of the defendant because of their malicious or oppressive character: *Goldsmith v. Joy*, 61 Vt. 488; 15 Am. St. Rep. 92, and note. But in the absence of gross negligence, malice, wrong, recklessness, insult, wantonness, or aggravating circumstances, no exemplary damages will be allowed: *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note 521, 522.

CROOM v. STATE.

[85 GEORGIA, 712.]

CRIMINAL LAW — HOMICIDE TO AVOID ARREST. — Where an officer is killed, with knowledge or reasonable grounds of belief that he intended and was endeavoring to make an arrest for a felony with which the accused was charged, it is murder; but if the killing was done suddenly, under the surprise of a night visit by an armed man, without knowledge of his purpose or official character, or reasonable ground of belief as to the same, and without malice, it is manslaughter.

CRIMINAL LAW — HOMICIDE TO AVOID ARREST — INSTRUCTIONS. — Where an armed officer, at night, with a posse, and without a warrant, is killed in attempting to arrest a person charged with felony, and the only expression used by the officer to indicate his official capacity or his purpose to arrest was, that "You are mine," or that "You are my meat," it is reversible error, upon the trial of the accused, to use the expression "You are mine," and to exclude the other and stronger expression in charging the jury, when the dividing line in the case between murder and manslaughter is upon whether or not the conduct and language of the officer, taken in connection with all the circumstances, indicated to the accused a purpose to arrest him for felony, rather than to molest him by mere violence for some lawless purpose.

J. W. Walters, for the plaintiff in error.

Clifford Anderson, attorney-general, *W. N. Spence*, solicitor-general, and *D. H. Pope*, for the state.

BLECKLEY, C. J. Croom, a negro, killed Hamlin, a white man, in August, 1889; and on the trial of an indictment

therefor, he was found guilty of murder, and sentenced to be executed. The evidence made, in substance, the following case: Some months previous to the homicide (according to a part of the evidence, eleven months, according to another part of it, from two to six months), Croom shot a railroad boss named Strickland (not killing him), and a warrant issued for his arrest. He absconded, and kept out of the way until the night of the homicide, visiting his father's house, which seems to have been his home, only twice during the interval. The warrant was in the hands of the marshal of Ty Ty, one of the villages of the county, who, without delivering it to Hamlin, showed it to him and told him if he would arrest Croom he would divide with him a reward of twenty-five dollars, which he, the marshal, had been offered for making the arrest. Hamlin, with a *posse* of three men, went to the house of Croom's father, in the night-time. Leaving two men outside, and keeping the other with him, he knocked at the door for admission, the inmates of the house then being, besides Croom, his father, mother, and sister. The father and mother came to the door, and found there Hamlin with one of his *posse*. Hamlin requested the father to let them in, and inquired if anybody was there except home-folks. The father answered, "No." They told him they wanted to go in and make a search to see, not saying of whom they were in search, but that they were hunting for a man. They did not say for what they wanted him. Hamlin was armed with a Winchester rifle, and Croom's mother wanted to know of him what authority he had to come in her house. According to her testimony, she said to him, "Mr. Hamlin, where is your warrant for searching my house?" and he held his gun up and said, "Here is my warrant." The father testified that he asked them if they had a warrant or anything with which to search the house, and that Hamlin held up his gun, slapped it, and said, "This is my warrant." The mother, if not the father, gave them permission to enter, and they did so, Hamlin carrying in his gun and the other man having a pistol in his pocket. They started to go from the main room into a small room, and met the accused coming out. Hamlin said to him, "Halt," or "Hello, John"; the latter answered, "Yes, sir," or "Hello, Mr. Hamlin." Hamlin responded, "You are mine," or "John, you are mine." Of two witnesses for the state, one gives the former, the other the latter, form of the response. The mother testified that the response was,

"Consider that you are my meat." In her cross-examination, she said it was, "You are my meat." The father testified it was, "You are my meat to-night." The accused instantly fired a pistol at Hamlin, the ball hitting him just above the eye, and causing death within a few hours. According to the evidence for the state, Hamlin, when shot, was holding his gun with the muzzle pointing to the floor, and not in a shooting position. The mother testified that the gun was drawn on the accused as if Hamlin was going to shoot him; that he raised the gun and fixed to cock it, but she did not know whether it was cocked or not; the father testified that he saw him raise up his gun, and then turned away his head because he did not want to see his son shot down. After shooting Hamlin, the accused said to his mother, "Get out of the way; I want to get the other one." The man who was with Hamlin, thinking that he himself was shot, ran out of the house and to the gate, five or six yards from the house. After stopping, he saw the accused on the porch, who forbade his return into the house. The accused then ran off, and made his escape. It is quite certain from the evidence and the statement of the accused, taken together, that whilst Hamlin and his companion stood at the door, and the conversation between them and the parents of the accused was going on, the accused left the house through the back door, and was halted by one of the posse stationed in the rear of the house, and that he (the accused) turned round and re-entered the house. The man who halted him then ran upon the porch, and cried, "There he is, boys," and immediately afterwards he heard Hamlin accost him, and then heard the pistol fire. A short time before Hamlin was killed, he himself had shot and killed a negro in Ty Ty named Roberts, whilst trying to arrest him for gambling. This appeared from one of the state's witnesses; and the mother of the accused testified that he had heard of it, and also of the killing of two negroes at some railroad shanties, or at a neighboring village, as to which killing other witnesses testified; but it appeared that Hamlin was not present when it occurred. Hamlin had acted as bailiff three or four years previously, and was elected as a regular bailiff a very short time before he killed Roberts. The mother of the accused knew that Hamlin was a bailiff, but could not say whether the accused knew it or not. He said, in his statement to the jury at the trial, that he did not know Hamlin was an officer; that if he was one, he did not know it; that

when he, the accused, shot Strickland, Hamlin was no officer. The reason he assigned for shooting Hamlin was, that he was afraid of him, and thought Hamlin was going to shoot him, and that it was necessary to shoot to save his own life.

Various details, both in the evidence and in the prisoner's statement, have been omitted; but the foregoing is the substance of all that is material. The motion for a new trial, besides the general grounds, sets forth a special ground, assigning error on the charge of the court, the court having charged as follows: "If you believe from the evidence in the case that the officer went there to arrest him, and called him, and told him he was his, and he answered back, or if the officer called his name, and told him he was his, and the officer made no effort to hurt him, and he shot the officer under these circumstances, it would be murder, although the officer may have had a gun hanging down by his side or in his hands at that time."

1. This instruction hugs the evidence for the state so closely as to leave the jury no room for grading the homicide otherwise than as murder, provided they credited the evidence of the state's witnesses, and accepted the same in its letter. It makes the question, not only of guilt or innocence, but of murder as distinguished from manslaughter, turn upon a single pivot, and upon a part of the evidence instead of the whole of it. And that the jury must have so understood it is manifest; for nowhere else in the charge is there anything to relax this iron-bound rule prescribed to them from the bench. On the contrary, the sentence immediately preceding the one under review reads thus: "If you believe from the evidence that the defendant, at the time he did this killing, had no necessity to do it; if you believe at that time that his life was not in danger, that the circumstances were not such as would make a reasonable man believe that his life was in danger at the time, and if there was no necessity for the killing, — you should find the defendant guilty of the offense of murder." Instead of laying down this narrow rule, the court should have charged that, in the absence of necessity, or of appearances to warrant a reasonable belief that it existed, the killing would be unlawful, and would be either murder or voluntary manslaughter; that if it was done with knowledge or reasonable grounds of belief that Hamlin intended and was endeavoring to make an arrest for the felony with which Croom was charged, — it would be murder; but if the killing was done sud-

denly, under the surprise of a night visit by an armed man, without knowledge of his purpose or official character, or reasonable grounds of belief as to the same, and without malice express or implied, it would be manslaughter. The warrant, not being in the hands of Hamlin, but in the possession of the marshal of Ty Ty, who was not present, was no authority to Hamlin to make an arrest: Wharton on Homicide, sec. 242; *Rex v. Patience*, 7 Car. & P. 775; *Cod v. Cabe*, 13 Cox, 202. Nevertheless, there was ample authority in the law itself; for an officer may arrest for felony on probable grounds without warrant: *Cod v. Cabe*, 13 Cox, 202; 2 Hale P. C. 85; 1 Am. & Eng. Ency. of Law, 733; *Drennan v. People*, 10 Mich. 169; *McCarthy v. De Armit*, 99 Pa. St. 63; *Rohan v. Sawin*, 5 Cush. 281; *Hobbs v. Branscomb*, 3 Camp. 420; *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702; *People v. Pool*, 27 Cal. 572. An officer may even arrest without warrant for an offense less than felony, where the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of a magistrate to issue a warrant: Code, sec. 4723. And to prevent a failure of justice, a private person may arrest for felony upon reasonable and probable grounds of suspicion: Code, sec. 4724; *Long v. State*, 12 Ga. 293; Wharton's Crim. Pl. & Pr., sec. 13; 1 Am. & Eng. Ency. of Law, 741, and cases cited.

Had Hamlin been no officer, but only a private citizen, Croom ought to have submitted to the arrest without resistance, provided he knew, or the circumstances put him upon notice, that an arrest was intended. A private man has quite as much power to arrest a fugitive felon, where the emergency calls for immediate action, as a public officer, and while so doing is equally under the protection of the law. To kill him would be murder, the same as to kill an officer, where nothing appeared to grade the homicide, save that he intended and was attempting to make an arrest. But the fugitive, though not justified in killing him to avoid arrest, might be relieved from the imputation of malice if he were ignorant of the purpose and intention of the attack made upon him or his liberty. It would not necessarily follow, under all circumstances, that the knowledge of being subject to arrest for a given offense would be equivalent to knowledge that an arrest for that offense was contemplated in the particular instance. No doubt it would be a powerful factor in the determination of the question; yet the question would be for the jury, and not for the court. So where the arrest is attempted by an officer, knowl-

edge of his official position or character would be of great weight in bringing home to the fugitive notice of his purpose; whilst ignorance of it, with no warrant in his possession to vouch for him, would reduce the officer to very much the same level as if he were a private citizen. Knowledge or notice of his official character, or of his presence for an official purpose, would be material: 1 Russell on Crimes, 835; Wharton on Homicide, sec. 241; *Yates v. People*, 82 N. Y. 509; *Rex v. Ricketts*, 3 Camp. 68, and note. Irregular conduct of the officer at the time may be misleading: Roscoe's Crim. Ev. 801; *Drennan v. People*, 10 Mich. 169; *Bellows v. Shannon*, 2 Hill, 86; *State v. Curtis*, 1 Hayw. (N. C.) 471. Ordinarily, no doubt, the inhabitants of an officer's bailiwick are presumed to know him as an officer; but this bailiff had been recently elected, the accused had been absent from the neighborhood, and it might well be true, as he said in his statement, that he was unaware of his being an officer. The charge of the court made no allusion whatever to that question, and certainly the words of arrest used, taking either version of them, were not explicit, but quite informal. They were so ambiguous that little or no information could be obtained from them indicative of Hamlin's official character. No form of words in making an arrest is necessary. If, under all the circumstances, Croom believed or ought to have believed that the object was to arrest him, to take him into custody as a prisoner to answer the charge of felony, there was no excuse for the killing, and nothing to mitigate it. But surely the question of mitigation was one for the jury, as well as the question of justification. The court did charge upon the subject of voluntary manslaughter, in these terms: "If you believe from the evidence and circumstances that there was no malice, express or implied, and that the killing was done under a sudden violent impulse of passion by the defendant, and, under the rules I have given you, that the officer was the assailant, that he was a wrongful assailant and not a rightful assailant, then it would not be murder, but voluntary manslaughter." This made it necessary, in order for the homicide to be graded as manslaughter, for the officer to be found in the wrong, ignoring the fact that he might be in the right and the accused not know it. This conflicts with the principle recognized in *Davis v. State*, 79 Ga. 767, and in many of the authorities above cited. Moreover, being expressed in general terms, and not applied to specific facts, like that part of the charge pointing out exactly what would render the

accused guilty of murder, it would by no means weaken the effect of that, or give the jury any more scope under it for finding manslaughter, than, taken by itself, it afforded; and we have already seen that it afforded none at all. Nor did the court intend, by adding what we have quoted as to manslaughter, to relax or modify anything previously laid down. This is shown by the words in the quotation, "under the rules I have given you," by which words all the court had said in reference to murder was preserved and virtually repeated.

2. The real pressure of the case, as between murder and manslaughter, was upon whether the conduct and language of the officer, taken in connection with all the circumstances, indicated to Croom a purpose to arrest him for felony, rather than to molest him by mere violence for some lawless object. Hamlin had shortly before that time killed a negro unlawfully; for he could not lawfully kill him merely because he ran from him to avoid arrest for a misdemeanor. Croom had heard of this killing. He had also heard that two other negroes had been killed; and they had been killed, but not by Hamlin. There is some probability, therefore, that he might, as he said in his statement, be afraid of Hamlin, and although any fear for his life might have been groundless, he nevertheless may have entertained it, and if so, may have acted under a greater sense of provocation and with more haste than he otherwise would. Let us suppose that it did not occur to his mind that Hamlin's business or purpose was to arrest him for the felony, but that it was to do him some violence, and that, under that belief, entertained *bona fide*, having first attempted to make his escape, and being prevented by one of the *posse* stationed behind the house, he shot Hamlin, without premeditation or malice, in the hurry and heat of running to and fro to avoid his apprehended violence; would the homicide be the same grade of offense as it would if committed to prevent an arrest? Suppose the colors reversed, and that a white man had killed a negro officer under such circumstances; would it not be thought needful to a fair trial and legal conviction that the possibility of this being the true state of the case should be submitted to the jury? We cannot see the whole truth, where conflict occurs between men of different races, without taking into account the natural law of race influence upon thought, feeling, and conduct. That negroes are more prone to entertain unfounded fears of white men than white men are of negroes is a fact too well known to admit of

question. And while unfounded fear is no excuse for homicide, it may serve to explain why a mind under the shock of a nocturnal surprise might be thrown off its guard, and fail to interpret correctly conduct which to a mind not so agitated would be easy of comprehension. This being so, it was not, as we think, a fair and equal submission of the case to the jury for the court to recite, in its charge, the milder form of words attributed to Hamlin by the evidence, upon the use of which the shooting immediately followed, and make no allusion to the more aggressive form. Why should the jury be told that if the words used were, "You are mine," the consequence, on certain conditions, would be murder, and not told what the consequence would be if the words were, "You are my meat"? It is evident that "You are mine" is the better shape for the state, and "You are my meat" the better shape for the prisoner. Because to say to a man, with a gun in your hands, that he is your meat, is suggestive of slaughter, and well calculated to make him overlook any probability that you intend to arrest him, and provoke him to treat you as if you had come for something else. He might have no reasonable grounds to fear you; but he might fear you all the same, at least to the extent of losing his presence of mind so far as not to realize at the moment that he was a fugitive, and that you had come to arrest him on that account.

There is another reason why there should have been no recognition from the bench of one form without also recognizing the other. One of the forms came from the state's witnesses, the other from the witnesses of the defendant. To adopt the form supplied by the state's witnesses, and make that the sole basis of instruction on the subject, would have the appearance of indorsing those witnesses and giving them a sort of preference, the influence of which might, consciously or unconsciously, be extended by the jury to other parts of the case. Indeed, the charge followed the state's witnesses not only as to the words used by Hamlin, but somewhat as to the position of his gun. Touching neither of these matters was the alternative favorable to the defendant, put to the jury on the specific facts as proved by his witnesses. The jury were nowhere instructed expressly that if Hamlin said "You are my meat," and raised up his gun as if he were going to shoot the defendant, what effect this would have in grading the offense. Surely, if, as matter of law, the court could instruct the jury how to grade by one side of the alternative, instructions equally

explicit could and should have been given touching the other side.

It is proper to add that what we have said in this opinion is not to be taken as any intimation that we believe the theory of the defense is well founded in fact, either as mitigation or justification. On the contrary, we see not the slightest objection to the verdict of the jury as the outcome of the evidence, and had there been no material error in the charge of the court, we should have left it undisturbed. But in a case of life and death, where the evidence is conflicting, a verdict rendered under an erroneous charge from the bench, which may have done serious harm to the accused, is illegal, and should be set aside without regard to the opinion of this or any other court as to the guilt of the accused. The law will take the life of no man, whatever may be his color or condition, without first affording him a legal trial.

Judgment reversed.

HOMICIDE—KILLING TO AVOID ARREST.—The killing of one who has authority to make an arrest by the one sought to be arrested is murder: *Roberts v. State*, 14 Mo. 188; 55 Am. Dec. 97. Yet one may rightfully resist an illegal arrest, even to killing his assailant; if the resistance is by lawful means, the killing is excusable homicide; if by unlawful means, without malice, it is manslaughter; if by unlawful means, prompted, however, by hate and malice, it is murder in the first degree: *State v. Scheele*, 57 Conn. 307; 14 Am. St. Rep. 106, and note. See also *Mealy v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477, and note.

HOMICIDE—DEGREES OF MURDER.—The court should define and explain the different degrees of murder and manslaughter which are warranted by any theory of the evidence in the case: *State v. Turner*, 29 S. C. 34; 13 Am. St. Rep. 706; *Hawes v. State*, 88 Ala. 40; *State v. Adams*, 78 Iowa, 292. The instruction explaining the degrees of murder must not, however, be mere abstract statements of law: *State v. Mitchell*, 98 Mo. 658; nor need the court instruct on any particular degree of murder, when under no theory of the case could defendant be found guilty of that degree: *State v. Anderson*, 98 Mo. 461. For the statutory division of murder into degrees, see note to *Whitford v. Commonwealth*, 18 Am. Dec. 774-787. For instructions properly defining murder in the first degree, see *People v. Bowman*, 81 Cal. 566; *State v. Anderson*, 98 Mo. 461; *State v. Wilson*, 98 Mo. 440; *State v. Adams*, 78 Iowa, 292; *Hawes v. State*, 88 Ala. 40. For instructions properly defining the crime of murder in the second degree, see *State v. Adams*, 78 Iowa, 292; *State v. Wilson*, 98 Mo. 440; *State v. Anderson*, 98 Mo. 461. For an instruction erroneously defining murder in the second degree, see *State v. Mitchell*, 98 Mo. 658. For instructions properly defining manslaughter, see *Hawes v. State*, 88 Ala. 40; *Bell v. People*, 125 Ill. 584; *State v. Adams*, 78 Iowa, 292. For cases in which instructions as to manslaughter were demanded by the evidence, see *Shell v. State*, 88 Ala. 14; *State v. Adams*, 78 Iowa, 295. For definitions of manslaughter in the second, third, and fourth degrees, under

the laws of Missouri, see *State v. Wilson*, 98 Mo. 440; *State v. Elliott*, 98 Mo. 151; *State v. Wensell*, 98 Mo. 137. Sudden provocation, acted on in the heat of passion produced thereby, may reduce a homicide to manslaughter: *Holmes v. State*, 68 Ala. 26; 16 Am. St. Rep. 17, and note 19, 20; *State v. Schoele*, 57 Conn. 307; 14 Am. St. Rep. 106, and note; *Bonnard v. State*, 25 Tex. App. 173; 8 Am. St. Rep. 431. Heat of passion is not confined to cases where there is provocation, for it may arise out of a sudden quarrel: *State v. Wilson*, 98 Mo. 440.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

MIDLAND RAILWAY COMPANY v. FISHER.

[125 INDIANA, 19.]

CORPORATION ACQUIRING THROUGH FORECLOSURE SALE PROPERTY OF ANOTHER CORPORATION NOT LIABLE FOR GENERAL DEBTS OF LATTER. —

A corporation which succeeds to the property and rights of another corporation, through the medium of a sale upon a decree of foreclosure, is not responsible for the general debts of the corporation whose property and franchises it acquires.

OBIGATION OF CORPORATION TO PERFORM AGREEMENT OF ITS GRANTOR NOT MERE GENERAL DEBT OF LATTER WHEN. —

Where a corporation has, in a deed conveying to it a right of way for a railroad, agreed to build a fence, the right of the grantor to have this agreement performed by another corporation, which, under a sale upon a decree of foreclosure, succeeds to the rights of the old corporation, is not a mere general debt of the old corporation, but is a right blended with the right of the new corporation to use and occupy the land with its track. The liability of the new corporation does not rest upon the claim against the old corporation, but upon the duty which arises out of its own occupancy of the land, and it cannot be permitted to enjoy the easement, and yet refuse to perform the agreement which created and conferred the easement.

GRANTEE OF ORIGINAL COVENANTOR BOUND TO PERFORM LATTER'S AGREEMENTS WHEN. —

When a deed which creates a right discloses a covenant which burdens the right, a subsequent grantee of the original covenantor, in accepting such deed and asserting a claim to the privileges conferred by it, becomes bound to perform the agreement. And when, in addition to the covenant in the deed, the facts open to observation show that the covenant has not been kept, such grantee cannot justly claim the rights of a purchaser without notice.

COVENANT RUNNING WITH LAND, WHAT IS. — An agreement in a deed conveying a right of way for a railroad, to fence the same, is a covenant running with the land and essentially inhering in it, and such covenant binds the grantee of the original covenantor, and inures to the benefit of the owner of the servient estate in which the easement with its encumbrance inheres.

DEED POLL, ACCEPTANCE OF, EFFECT OF.—The acceptance of a deed poll by the grantee makes it the mutual written contract of the parties, and therefore the statute of limitations respecting verbal contracts does not apply thereto.

ACTION OF COVENANT LIES AGAINST GRANTEE OF DEED POLL.

THE opinion states the case.

H. and W. R. Crawford, and M. A. Chipman, for the appellant.

R. R. Stephenson and W. R. Fertig, for the appellee.

ELLIOTT, J. In May, 1873, the then owners of the land described in the appellee's complaint conveyed to the Anderson, Lebanon, and St. Louis Railway Company a right of way. In consideration of the grant of the right of way, the company, by an agreement incorporated in the deed, promised to construct a board fence five boards in height on each side of the railroad as soon as it should be completed. The deed conveying the right of way was signed by the grantors, but not by the grantee. The railroad was completed in 1876, and the action was brought in 1886. In 1875 the company mortgaged all of its property and rights, and in 1883 the mortgage was foreclosed by a decree of the circuit court of the United States. A sale of all the property and franchises of the company was made upon the decree of foreclosure, and the Midland Railway Company purchased all of the rights of the mortgagor. Under the title thus acquired, the Midland company entered into possession, and began to operate the road purchased by it as soon as it acquired title. No fence has been erected, as provided in the deed granting the right of way. Fisher became the owner of the land in August, 1884.

The contention of appellant's counsel is, that their client did not become liable for the general debts of its predecessor, and that the debt which the appellee seeks to enforce is a general debt. We agree with counsel that the rule is, that a corporation which succeeds to the property and rights of another corporation, through the medium of a sale upon a decree of foreclosure, is not responsible for the general debts of the corporation whose property and franchises it acquires: *Lake Erie etc. R'y Co. v. Griffin*, 92 Ind. 487; *Hoard v. Chesapeake etc. R'y Co.*, 123 U. S. 222; *Gilman v. Sheboygan etc. R. R. Co.*, 37 Wis. 317.

But we cannot agree that the assumption that the claim of the appellee is a mere general debt is valid, for we regard

the performance of the agreement to build a fence as a condition of the right to enjoy the easement granted by the owners of the land. The right which the appellee seeks to enforce is more than a general claim for money, for it is a right blended with that of the appellant to use and occupy the land with its track. The appellant's liability does not rest upon the claim against the old company, but upon the duty which arises out of the occupancy of the land. It cannot, in equity, be permitted to enjoy the easement, and yet refuse to perform the agreement which created and conferred the easement. We think the principle declared in *Lake Erie etc. R'y Co. v. Griffin*, 92 Ind. 487, *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480, *Lake Erie etc. R'y Co. v. Griffin*, 107 Ind. 464, *Bloomfield R. R. Co. v. Grace*, 112 Ind. 128, *Indiana etc. R'y Co. v. Allen*, 113 Ind. 308, 3 Am. St. Rep. 650, and *Donald v. St. Louis etc. R. R. Co.*, 52 Iowa, 411, governs this phase of the case.

The appellant is in the possession of the right of way as the grantee of the original contractor, and it must take the benefit it enjoys, subject to the burden annexed to it by the contract which gave existence to that benefit. It cannot enjoy the benefit and escape the burden, for the burden and the benefit are so interlaced as to be inseparable. The right to the benefit is so blended with the burden, that equity and justice forbid a severance.

One who takes a privilege in land to which a burden is annexed has no right to assert a claim to the privilege, and deny responsibility for the burden. A party who acquires such a privilege acquires it subject to the conditions and burdens bound up with it, and must, if he asserts a right to the privilege, bear the burden which the contract creating the privilege brought into existence. The one he cannot have at the expense of the other. In *Louisville etc. R'y Co. v. Power*, 119 Ind. 269, we said of a railroad company: "Holding the land under the deed, as it did, it was bound to perform its contract. To permit it to retain the land and repudiate the deed would be against equity and good conscience."

In this instance the covenant written in the deed was an essential part of it, and the agreement to construct the fence was part of the consideration for the land. The case is near akin to that of a suit to enforce a vendor's lien; for here the deed upon its face exhibited the contract, and the facts open to observation showed that the covenant had not been kept. The facts open to observation did more than put the appel-

lant upon inquiry; but had they done no more than put it upon inquiry, it could not justly claim the rights of a purchaser without notice. It must be held that the covenant in the deed through which the appellant claims, and the facts open to observation, imparted notice of the covenant, and notice also of its non-performance.

The covenant is, as we have indicated, an integral part of the deed, upon which rest the rights of the appellant. The deed which creates the asserted right discloses the covenant which burdens the right. In accepting the right under such a deed, and asserting a claim to the privileges conferred by it, subsequent grantees of the original covenantor became bound to perform the agreement. The covenant passed with the land. The easement which burdened the fee was an encumbrance, and the party that took the land took it subject to the encumbrance; but in taking subject to the encumbrance of the easement, that party acquired the benefit interwoven with the encumbrance. Both the burden and the benefit, the easement and the covenant, essentially inhere in the land. One burdens the estate, the other benefits it. The party who acquires the estate necessarily acquires it with both the burden and the benefit. He must submit to the one, but he has a right to the other. In *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254, the question was examined with care, the authorities collected, and the judgment of the court was, that a covenant very similar to the one under consideration was a real covenant running with the land. In the case referred to the court quoted with approval from the case of *Savage v. Mason*, 3 Cush. 500, the following statement of the law: "The liability to perform and the right to take advantage of this covenant both pass to the heir or assignee of the land to which the covenant is attached. This covenant can by no means be considered as merely personal, or collateral, and detached from the land."

In *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254, the case of *Bloch v. Isham*, 28 Ind. 87, 92 Am. Dec. 287, was shown not to rule such a case as this.

The question in *Junction R. R. Co. v. Sayers*, 28 Ind. 818, must, for many reasons, be regarded as radically different from that here presented; but it is enough to say that in that case the burden was not annexed to the easement conveyed, but was created by an independent agreement. The question received careful attention in the case of *Conduitt v. Ross*, 102

Ind. 166; and the rule there declared is substantially the same as that laid down in the case of *Haslett v. Sinclair*, 76 Ind. 488; 40 Am. Rep. 254.

In *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 835, the authorities are reviewed at great length, and a covenant such as that here under consideration was held to run with the land; so that the earlier cases in that court, conceding them to be in point, are not of controlling force.

The very fully considered and strongly reasoned case of *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633, adjudges that a covenant to build a fence around a granted estate will create an encumbrance on the land, and this doctrine harmonizes with that of the cases to which we have referred. If it be true, and it is true, that the agreement constitutes a real covenant against encumbrances, then it must be true that it runs with the land. It is a covenant inhering in the granted easement of a right of way, and as such runs with that estate.

Applying this doctrine to the case before us, it clearly results that the estate in the land which the appellant's grantor took — the easement of a right of way — was burdened with the encumbrance created by the covenant to fence the granted property. The ultimate conclusion therefore is, that the covenant to fence binds the appellant, and inures to the owner of the servient estate in which the easement with its encumbrance inheres.

In addition to the cases we have here cited, and those collected in *Haslett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254, may be cited the following: *Huston v. Cincinnati etc. R. R. Co.*, 21 Ohio St. 235; *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135; *Duffy v. New York etc. R. R. Co.*, 2 Hilt. 496; *Wooliscroft v. Norton*, 15 Wis. 198; *Carr v. Lowry*, 27 Pa. St. 257.

The authorities are well agreed upon the proposition that a deed poll, when accepted by the grantee, becomes the mutual contract of the parties: *Newell v. Hill*, 2 Met. 180; *Goodwin v. Gilbert*, 9 Mass. 510; *Huff v. Nickerson*, 27 Me. 106; *Tripe v. Marcy*, 39 N. H. 439; *Stevens v. Morse*, 47 N. H. 532; *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633; *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135. The appellant's grantor, by accepting the deed, made its covenants binding upon it, and acquired the estate encumbered and burdened by the agreement; and the appellant, as the deed is in his chain of title, took the grantee's easement with its burden and its encumbrance: *Tripe v. Marcy*, 39 N. H. 439; *Stevens v. Morse*,

47 N. H. 532; *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633.

The promise of the appellant's grantor is not a verbal one, and the case is not governed by the provision of the statute of limitations respecting verbal contracts. The acceptance of the deed by the grantee named in it made it a written contract, and the obligations created by the deed are therefore express, and are evidenced by a writing. The adjudged cases very fully and satisfactorily sustain this doctrine. In one case it was said: "Nor is it material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in writing signed by only the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee": *Schmucker v. Sibert*, 18 Kan. 104; 28 Am. Rep. 765. The rule thus stated is sanctioned by many other cases: *Ricard v. Sanderson*, 41 N. Y. 179; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 85; 13 Am. Rep. 556; *Rogers v. Eagle Fire Co.*, 9 Wend. 618; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Newell v. Hill*, 2 Met. 180; *Goodwin v. Gilbert*, 9 Mass. 510; *Huff v. Nickerson*, 27 Me. 106; *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633.

The doctrine is a very ancient one. In Sheppard's Touchstone, 177, it is said: "If feoffment or lease be made to two, . . . and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, . . . and he that doth not seal doth, notwithstanding, accept of the estate, and occupy the lands conveyed or demised,—in these cases, as touching all inherent covenants, . . . they are bound by these covenants as much as if they do seal the deed."

Some of the authorities deny that the technical action of covenant will lie against the grantee of a deed poll; but an English author who favors the technical rule concedes that the weight of the English decisions is the other way, saying: "Perhaps, however, the doctrine has been too long sanctioned to be now reversed. At all events, it is an introduction of an equitable principle into a court of law, the acceptance of a deed being considered equivalent to an actual execution by the lessee": *Platt on Covenants*, 18. The equitable rule has much to commend it, while the technical rule is the product

of the slavish adherence to forms which did so much to deform the common law, and is without any merit entitling it to favor.

But we need not discuss this question at length, for it has been discussed again and again, and the better reasoned cases support the equitable doctrine: *Finley v. Simpson*, 22 N. J. L. 811; 53 Am. Dec. 252; *Harrison v. Vreeland*, 38 N. J. L. 366; *Sparkman v. Grove*, 44 N. J. L. 252; *Maynard v. Moore*, 76 N. C. 158; *Bowen v. Beck*, 94 N. Y. 86; 46 Am. Rep. 124; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 18 Am. Rep. 556; *Maine v. Oumston*, 98 Mass. 317; *Martin v. Drinan*, 128 Mass. 515.

CORPORATIONS — JUDICIAL SALE. — A purchaser acquiring the property and franchise of a corporation through a sale under execution takes them freed from all liability for former indebtedness, and from all mere personal obligations assumed by the former owner: *Gulf etc. Ry Co. v. Newell*, 73 Tex. 334; 15 Am. St. Rep. 783. But the duties imposed by the charter of a corporation rest upon it in the hands of whomever may become the owner of its property and franchise, and all subsequent purchasers are bound by covenants running with the property purchased: *Gulf etc. Ry Co. v. Newell*, 73 Tex. 334; 15 Am. St. Rep. 783.

COVENANTS RUNNING WITH THE LAND. — As to what are covenants running with the land, binding upon the grantee in a conveyance thereof, see *Fresno Canal Co. v. Rowell*, 90 Cal. 114; 13 Am. St. Rep. 112, and note; *Mores v. Garner*, 1 Strob. 514; 47 Am. Dec. 565, and note 569, 570; *Gilmer v. Mobile etc. Ry Co.*, 79 Ala. 569; 58 Am. Rep. 622, and foot-note; *Gulf etc. Ry Co. v. Smith*, 72 Tex. 122; *Kettle River Ry Co. v. Eastern Ry Co.*, 41 Minn. 461; *Watmore v. Bruce*, 118 N. Y. 320.

DEED POLL, ACCEPTANCE OF, BY GRANTEE, EFFECT OF. — The acceptance of a deed poll by the grantee therein, who has the legal capacity to contract, makes the contract binding upon him: *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633; *Bronson v. Ogden*, 106 Mass. 175; 11 Am. Rep. 335. Compare note to *Oulton v. Jackson Iron Co.*, 16 Am. St. Rep. 622, as to the effect of the grantee's acceptance of a conveyance.

SUPREME COUNCIL OF THE ORDER OF CHOSEN FRIENDS v. FORSINGER.

[125 INDIANA, 52.]

CERTIFICATE OF MEMBERSHIP OF MUTUAL BENEFIT SOCIETY IS CONTRACT OF INSURANCE. — The certificate of membership issued to a member of a mutual benefit society is a contract of insurance, and his right to recover upon it does not depend upon the action of the officers of the society, for if he has performed his part of the contract and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow the claim will not defeat a recovery.

ARBITRARY REJECTION OF CLAIMANT'S PROOFS BY OFFICERS OF MUTUAL BENEFIT SOCIETY INEFFECTUAL. — While a member of a mutual benefit society is bound to comply with the requirements of the valid by-laws of the association, the officers cannot defeat his claim by arbitrarily rejecting his proofs as unsatisfactory, or by wrongfully declaring that he had not done what his contract and the by-laws of the association required of him.

COMPLAINT AGAINST MUTUAL BENEFIT SOCIETY ON CERTIFICATE, WHEN SUFFICIENT. — In an action upon a certificate of membership of a mutual benefit insurance society, it is sufficient for the plaintiff in his complaint to allege the contract with the corporation, performance of the conditions on his part, that he has been totally disabled, and that he has made proper proof of his disability. He is not bound to allege that his proofs are such as satisfied the corporate officers.

PARTIES CANNOT OUST COURTS OF JURISDICTION WHEN. — It is not competent for parties to a contract, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of persons named in the contract shall be final and conclusive. And therefore a provision in the by-laws of a mutual benefit insurance society that the decision of its officers on a member's claim for benefits shall be final and conclusive is ineffective, and cannot bar an action to recover such benefits.

MUTUAL BENEFIT SOCIETY MAY PROVIDE FOR PRESENTATION OF CLAIMS TO ITS OFFICERS. — It is competent for a mutual benefit society to provide for the presentation of claims to officers designated in its by-laws, and it may also prescribe a mode of procedure, provided such mode is not such as to deprive parties of property rights.

BY-LAW OF BENEFIT SOCIETY REQUIRING APPEAL TO GOVERNING BODY VALID. — A by-law of a mutual benefit society requiring the presentation of claims for benefits to be made to its subordinate officers, and requiring, in case of a decision by them adverse to the claimant, an appeal to the governing body of the society, is reasonable and valid, notwithstanding an attempt to make the decision conclusive is abortive. The provision attempting to make the decision of the governing body final and conclusive is so distinct and different from the provisions concerning appeals that its invalidity does not destroy their force.

FAILURE TO APPEAL TO GOVERNING BODY OF BENEFIT SOCIETY ABATES ACTION. — In an action by a certificate-holder against a mutual benefit society whose by-laws require an appeal to the governing body, an answer, alleging the failure of the plaintiff to make such appeal before bringing the action, is good as a plea in abatement.

ACTION on a certificate of a mutual benefit society. The opinion states the case.

F. M. and J. A. Finch, for the appellant.

G. Carter and J. N. Binford, for the appellee.

ELLIOTT, J. The appellee's complaint is founded upon a certificate of membership issued to him by the appellant. The by-laws of the corporation contain, among others, this provision:—

"Should a member become totally and permanently disabled from following his or her usual or other vocation, by reason of disease or accident, such member, upon the receipt and approval of satisfactory proofs, as hereinafter provided, shall be entitled to a benefit not exceeding one half of the relief-fund certificate held by him or her."

The certificate issued to the appellee is a contract of insurance, and his right to recover upon it does not depend upon the action of the officers of the society; for if he has performed his part of the contract, and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow the claim will not defeat a recovery. The appellee was, of course, bound to comply with the terms of his contract, and with the lawful by-laws of the society. The valid provisions of the by-laws do, indeed, form part of his contract, and are of controlling force: *Supreme Lodge etc. v. Knight*, 117 Ind. 489 (496); *Pfister v. Gerwig*, 122 Ind. 567. But while it was necessary for the appellee to comply with the requirements of the valid by-laws of the association, it was not in the power of the officers to defeat his claim by arbitrarily rejecting his proofs as unsatisfactory, or by wrongfully declaring that he had not done what his contract and the by-laws of the association required of him. It was not necessary, therefore, for the appellee to do more than appropriately show, by his complaint, the contract with the corporation, performance of the conditions on his part, that he was totally disabled, and that he had made proper proof of his disability. He was not bound to go further, and allege that his proofs were such as satisfied the corporate officers. It was enough for him to show that they were such as his contract and the law of the land require. He was not bound to anticipate and avoid defenses; it was sufficient for him to make a *prima facie* case.

The appellant, by way of answer in abatement, sets forth the following by-law: —

"Section 6. On receipt of the proper notice of disease or accident disability, under section 4 of this article, the supreme councilor shall proceed to investigate the same. If at any time he deems the facts to warrant it, he may appoint one or more physicians, whose duty it shall be to make a careful examination of the member's condition, and report as to the character and permanence of the disability. If such report shows a disability of an unquestionably total and permanently disabling character, the supreme councilor, supreme recorder, and supreme medical director may approve the same, and order the benefit paid. If, however, in the opinion of said officers, there is any doubt concerning the permanence of the disability, they shall postpone the matter for any period they may determine upon, not exceeding one year, and shall then order a new examination, either by the same or other physicians. If the result of the second examination be also uncertain, said officers may, in like manner, provide for a third, upon the result of which they shall either pay, or refuse to pay, the benefit claimed. This decision shall be final and conclusive upon the parties affected thereby, unless reversed upon appeal by the supreme council in regular session. Any claimant feeling aggrieved may take such an appeal by serving notice thereof upon the supreme recorder within thirty days after receipt of notice by the claimant of the decision, by the claimant, his or her personal representatives. The supreme council shall accord the appellant a hearing at its next regular session, and dispose of the matter."

The answer sets out other provisions concerning appeals and regulating the mode of procedure. Both the complaint and the answer show that the claim was presented to the officers named in the by-laws; that action upon it was postponed, as the by-laws provide; and that it was finally rejected. The trial court held the answer bad, and that ruling is questioned by the assignment of errors.

Our decisions declare that it is not competent for parties, in advance of any dispute to oust the jurisdiction of the courts by providing that the decision of persons named in the contract shall be final and conclusive: *Louisville etc. R'y Co. v. Donnegan*, 111 Ind. 179; *Supreme Council etc. v. Garrigus*, 104 Ind. 183; 54 Am. Rep. 298; *Bauer v. Samson Lodge etc.*, 102 Ind. 262; *Kistler v. Indianapolis etc. R. R. Co.*, 88 Ind. 460.

There is some diversity of opinion upon this question, but the weight of authority sustains the doctrine declared by our own decisions. An author who has given the question full consideration says: "It is a settled principle of law that parties cannot by contract oust the courts of their jurisdiction; and agreements to refer to future arbitration will not be enforced in equity, and will not be sustained as a bar to an action at law or a suit in equity": Bacon on Benefit Societies, sec. 450. This principle is asserted by the supreme court of the United States, by the English courts, and by other tribunals: *Home Ins. Co. v. Morse*, 20 Wall. 445; *Scott v. Avery*, 5 H. L. Cas. 811; *Thompson v. Charnock*, 8 Term Rep. 139; *Reed v. Washington etc. Ins. Co.*, 138 Mass. 572; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55. The logical conclusion from this long-settled doctrine is, that parties cannot by contract provide for the conclusive settlement of questions before such questions arise, by designating persons to adjudicate upon them; and this conclusion has often been given effect in cases such as this by other courts as well as by our own: *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Lauman v. Young*, 31 Pa. St. 306; *Gray v. Wilson*, 4 Watts, 39; *Wood v. Humphrey*, 114 Mass. 185; *Rowe v. Williams*, 97 Mass. 163; *Braunstien v. Accidental etc. Ins. Co.*, 1 Best & S. 782.

It is obvious that there is a distinction between cases where the agreement that the decision of designated persons shall be conclusive is made after a dispute has actually arisen, and cases where it is made prior to the existence of any controversy. One reason for this distinction is, that parties may revoke an agreement to submit to arbitration and appeal to the courts for redress, and this right is one which cannot be abridged by an agreement made before either party can know what the nature of the controversy will be. The rule which we approve commends itself by its fairness and justice, for there is nothing unjust in declaring that parties may appeal to the courts of the country for redress, while there is something of unfairness in a provision which makes the decision of interested corporate officers final, and excludes resort to the judicial tribunals of the land. The rule we favor is both expedient and just.

As the provision declaring that the decision of the officers named shall be final is ineffective, the answer would not be good as a plea in bar; but if good at all, it is good as a plea in

abatement, so that if there is a valid defense the appellant rightly pleaded it in abatement. The question, therefore, is this: Does the failure of the appellee to appeal to the supreme council constitute matter in abatement, and preclude him from maintaining this action?

It is competent for a mutual benefit society to provide for the presentation of claims to officers designated in its by-laws. This much is clear: *Harrington v. Workingmen's Benevolent Ass'n*, 70 Ga. 340; *Anacosta etc. v. Murbach*, 13 Md. 91; 71 Am. Dec. 625. If it has this right, then it seems equally clear that it may prescribe a mode of procedure, provided that the mode of procedure prescribed is not such as to deprive parties of property rights. As we have, in effect, already declared, property rights cannot be destroyed by what some of the courts denominate "these self-constituted judicatories"; *Lampfers v. Grand Lodge etc.*, 47 Mich. 429; *Cullen v. Duke of Queensbury*, 1 Bro. C. C. 101; *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665, and note. But requiring claims for benefits to be presented to the officers of the association is not, in any just sense, an invasion of the property rights of the member, nor is a by-law requiring their presentation unreasonable. The authorities are well agreed upon this question: *Van Poucke v. Netherland etc. Society*, 63 Mich. 378; *Bauer v. Samson Lodge*, 102 Ind. 262; Bacon on Benefit Societies, sec. 94. It is not unreasonable to provide that the member claiming benefits shall appeal to the governing body of the association. The member voluntarily enters the association with knowledge of its by-laws, and agrees to be bound by such as are not in violation of law, and certainly no principle of law is violated in making provision for the submission of claims of a member to the highest body of the association with which he voluntarily unites himself. It is but just to the association that its chief officers should have an opportunity to investigate the claim asserted by the member before it is harassed by litigation; and indeed the provision is presumptively for the benefit of the member, for the fair inference is that the governing officers will do their duty and allow all rightful claims. At all events, there is no principle of law violated by a by-law requiring an appeal to the governing body. By-laws similar to that under consideration have often been upheld. There is, indeed, no contrariety of opinion upon the question. We have no doubt that a by-law requiring the presentation of claims to subordinate officers, and requiring,

in case of a decision adverse to the claimant, an appeal to the governing body of the society, is reasonable and valid.

The by-laws of the appellant do require an appeal to the governing body, and in so far as this requirement is concerned they are effective, although the attempt to make the decision of the subordinate officers conclusive is abortive.

The provision which assumes to make the decision of the supreme councilor, supreme recorder, and supreme medical examiner final and conclusive is so distinct and different from the provisions concerning appeals that its invalidity does not destroy their force. It is well settled that part of a by-law may be valid although other parts may be void.

The language of the by-law is plain and explicit upon the subject of appeals to the supreme council. It is not, as counsel for appellee argue, a mere privilege that is conferred upon claimants by the provisions concerning appeals, but, on the contrary, a duty is imposed upon them. The provision is, that the decision of the officers named shall be final, unless reversed on appeal by the supreme council, and this, of itself, implies that the claimant must appeal to that body. But there are other provisions which make it quite clear that the claimant must appeal or accept the decision of the officers designated as a conclusive adjudication upon the merits of his claim. The clear implication from all the provisions of the by-laws is, that the member must, at least, exhaust the remedies provided by the contract before seeking aid from the courts, or show some excuse for his failure to do so. We do not doubt that if the officers of the society should refuse an appeal, or do any act hindering or delaying an appeal, the member might at once invoke the assistance of the courts: *Supreme Sitting etc. v. Stein*, 120 Ind. 270. But it cannot be presumed, in the absence of averments to the contrary, that the officers have been guilty of a breach of duty, so that it is incumbent upon a party who relies upon the wrong of the corporate officers to show by affirmative allegations their wrongful conduct.

The authorities, as we have said, are agreed upon the proposition that mutual benefit societies may require an appeal to the governing body as a condition precedent to a right of action, so that upon that question there can be no doubt; indeed, the only doubt is, whether they may not go further, and make the decisions of the officers designated in the contracts with their members final and conclusive. In this instance the by-laws provide that the decision of the subordinate officers designated

shall be final, unless reversed on appeal by the supreme council, so that the only infirmity is that created by the attempt to substitute tribunals chosen by the parties themselves for those established by the law of the land. It was competent to provide that the decision of the officers should be sought, and it was also competent to provide that a member dissatisfied with their decision should, before resorting to the courts, appeal to the governing body of the association, although it was not competent to make the decision final and conclusive. It is well settled that the decisions of arbitrators, engineers, architects, or others named in a contract as persons to whom controversies may be referred, are deemed to be *prima facie* right, and it is nothing more than an application of an old principle to a new instance to hold that where the contract of a member with a mutual benefit society provides that designated officers shall pass upon the validity of his claim their decision shall be deemed *prima facie* valid. Even if the decision is merely *prima facie* right, the only mode of first questioning it must, upon principle and authority, be that provided by the contract. Until the claimant has done what his contract requires, or has shown some valid excuse for not doing it, he cannot have any standing in court. It is going quite as far as authority or principle will justify to hold that although the parties have contracted that the decision of designated persons shall be final, the decision can only be deemed *prima facie* correct, and we cannot go further, and hold that although a party refuses to appeal to the governing body of an association of which he is a member, he may, notwithstanding the provisions of his contract declaring the decision of such officers final, unless appealed from, bring an action against the association. It is certainly imposing no hardship upon the member to require him to pursue the mode pointed out by his contract. The rule we declare is indeed favorable to him, for it enables him to appeal to the courts after he has exhausted the remedies designated in the by-laws notwithstanding the provisions of his contract. The member who asks to be relieved from the duty of appealing to the governing body in such a case as this asks what equity and justice deny.

Judgment reversed.

MUTUAL BENEFIT SOCIETIES. — For a general discussion of the law applicable to mutual benefit societies, see extended note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 781-791; *Britton v. Supreme Council*, 46 N. J. Eq. 102; 19 Am. St. Rep. 376, and note; *Block v. Valley Mut. Ins. Ass'n*, 52 Ark. 201; 20 Am. St. Rep. 166.

PHENIX INSURANCE COMPANY v. TOMLINSON.

[125 INDIANA, 64.]

WAIVER OF RIGHT TO DECLARE FORFEITURE OF INSURANCE POLICY FOR NON-PAYMENT OF PREMIUM. — The right to declare a forfeiture of a policy of insurance for the non-payment of premiums may be waived, and the waiver may be manifested by conduct as well as by words.

ACCEPTANCE OF PREMIUM AFTER LOSS HAS OCCURRED IS WAIVER of the right to declare a forfeiture of a policy of insurance, and not a mere act of revivor, and confirms the contract as of the date of its execution.

FORFEITURES ARE NOT FAVORED IN LAW, and courts will not put such a construction upon the conduct of parties as will practically produce the same result as a declaration of forfeiture, if they can reasonably do otherwise.

ACTION on a policy of insurance. The opinion states the case.

A. Gilchrist, C. A. De Bruler, A. O. Ayres, E. A. Brown, and L. M. Harvey, for the appellant.

J. S. Duncan, C. W. Smith, and J. R. Wilson, for the appellees.

ELLIOTT, J. The complaint of the appellee alleges that the appellant issued to him a policy of insurance covering a period of five years; that in payment of the premium the appellee gave the appellant \$9.73 in money, and executed a promissory note for \$16.89; that the property insured was destroyed by fire on the first day of August, 1887; that immediately thereafter he gave the appellant due notice of the loss, and that the appellee performed all of the conditions of the contract on his part. The averment of performance is, however, qualified by specific allegations, which read thus: "And the plaintiff admits it to be true that when said premium note became due he did not pay the same. But he would further show that after the maturity of the note, and prior to the loss, to wit, on the twenty-fifth day of June, 1887, said Phenix Insurance Company recovered judgment against the plaintiff on said premium note, for the full amount thereof, before one Ezra Martin, a justice of the peace in and for Wayne township, Marion County, Indiana; that the plaintiff procured execution to be stayed, by one — offering himself as replevin bail, who was accepted as such by said justice of the peace; that said replevin bail had thus been tendered and accepted before the happening of said loss; that thereafter, on the expiration of the stay of execution, to wit, on October

10, 1887, the said judgment was, by this plaintiff, fully paid and satisfied to said justice of the peace."

The policy contains the following provision: "In case the assured fails to pay the premium note, or order, at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term."

The contention of the appellant is, that the complaint is bad, for the reason that it is not shown that there was a performance of the conditions precedent on the part of the plaintiff. The theory of the appellant's counsel is, that the appellant did not, by resorting to legal proceedings, nor by accepting the amount of the judgment rendered on the note, waive its right to insist that the appellee lost his claim to the benefit of the policy during the time the premium remained unpaid. The counsel for the appellee thus outline their theory: "Our contention is not at all that the taking of the judgment on the premium note, and the entering of replevin bail, were equivalent to the payment of the note; hence we do not discuss any citations to that point. Our theory of the case is this: We say that when the note went past due, the insurance company had a right to declare such policy forfeited for such non-payment, and it likewise had the power to waive such forfeiture, and consider the policy in force; that this waiver may be by conduct as well as by words; that there are certain lines of action or conduct which in law clearly work a waiver of any such forfeiture."

It is established law that the right to declare a forfeiture of a policy for the non-payment of premiums may be waived, and that the waiver may be manifested by conduct as well as by words: *Sweetser v. Odd Fellows' etc. Ass'n*, 117 Ind. 97; *Willcuts v. Northwestern etc. Ins. Co.*, 81 Ind. 300; *Behler v. German etc. Ins. Co.*, 68 Ind. 347; *United Life etc. Ins. Co. v. President etc. Ins. Co.*, 42 Ind. 588; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572; *Appleton v. Phenix M. L. Ins. Co.*, 59 N. H. 541; 47 Am. Rep. 220; *Stylow v. Wisconsin Odd Fellows' etc. Ins. Co.*, 69 Wis. 224; *Helms v. Philadelphia etc. Ins. Co.*, 61 Pa. St. 107; 100 Am. Dec. 621. This general rule is too firmly settled to be shaken, so that the only question

which is here open to controversy is, whether the company did waive the right to forfeit the policy by an acceptance of the premium after the loss had occurred.

It is proper to say at the outset that this case is to be discriminated from such cases as *American Ins. Co. v. Henley*, 60 Ind. 515, and *American Ins. Co. v. Leonard*, 80 Ind. 272, for the reason that in those cases the premium notes were shown to be unpaid at the time of the loss, and it did not appear that the insurance company had subsequently accepted payment, while here there was an acceptance of the premium after the loss occurred.

We cannot perceive any solid ground upon which it can be held that an insurance company may accept payment of the entire premium after a loss has occurred, and yet escape payment of the loss. By accepting payment it affirmed the validity of the policy, and tacitly asserted that the policy was in force from the time it was executed. In such a case there is no interregnum in which there was a lifeless policy, for the policy is continuous in its nature and effect, and the premium covers the risk as an entirety. It would do violence to the intention of the parties and the language of their contract to declare, as the appellant seeks to have us do, that the payment simply revived the policy. It cannot be justly affirmed that the parties meant to revive a policy in a case where, as here, the act which revived it was performed after the loss occurred. The reasonable effect to be attributed to such an act is, that the parties meant that the affirmance of the contract should relate back to the execution of the policy.

In our judgment, acceptance of the premium after the loss has occurred is a waiver of the right to declare a forfeiture of the policy, and not a mere act of revivor. It is not reasonable to assume that the parties meant to do no more than revive the policy and give it force from the time of the acceptance of payment, since, as the loss had already occurred, the insured could acquire no benefit from the revived policy. The only rule which would yield him benefit and give him a consideration for his money is that which we adopt.

It is a principle of wide sweep that forfeitures are not favored; and within the spirit of this principle such cases as this clearly fall. To treat the acceptance of the premium as merely reviving the contract is, in effect, to adjudge a forfeiture, for in the event that we should adopt the views of the appellant, the result would be the same as to adjudge the

policy forfeited. This is clear when it is brought to mind that if the policy is held to be lifeless from the time of default in payment until after the loss, it must also be held that the insured cannot recover anything upon his contract. A construction of the conduct of the parties which will practically produce the same result as a declaration of forfeiture is one which it is the duty of the courts to avoid if it can reasonably be done. It is clear that this construction may be reasonably avoided; it is indeed quite clear that such a construction as that for which the appellant contends would be against reason and justice.

It is a familiar general rule that a party who accepts and retains benefit from a contract confirms the contract as it was executed. Under the operation of this general rule, there is not a revival of a contract, but a confirmation, and we can see no reason why such a case as this should be excepted from the rule. The doctrine we approve produces equitable results. It certainly does so in this case, for it is but just that the company, having accepted the entire premium after the occurrence of the loss, should yield the consideration for which the premium was paid. It is not just that the company should retain the premium and give no value in return.

The fact that all of the property insured was not destroyed does not affect the question, for the policy is indivisible and continuous. If, to put an illustrative case, the premium should be five hundred dollars and the amount of the loss only fifty dollars, and the insurance company should enforce payment of the entire premium after the loss occurs, it seems quite clear that it could not escape payment of the loss; and the principle in the real case must be the same as that in the supposed, for the amount cannot change a fundamental principle of law. It was not in the power of the assured to pay part only of the premium; he was bound to pay it all or lose the benefit of his contract. The rights of the parties are reciprocal. The company was not bound to accept part of the premium, nor had it a right to treat the premium as paid upon part only of the property insured. It was the right of the company to refuse to accept part of the premium, but it had no right to accept the whole premium and treat it as payment for an insurance upon part only of the property covered by the policy. Having accepted the entire premium, with full notice of the loss, it confirmed the contract as to the whole of the property insured. It had the right to elect

to accept or reject the premium, but it cannot accept the entire premium and yet assert that it is liable only from the time of the acceptance, although the loss occurred prior to that time.

The provision of the policy we have quoted does not provide that the default in payment shall entitle the company to treat the premium as earned; if it did, we should have a more difficult question. In this instance the premium was not earned, for the period covered by the policy was five years, and the loss occurred within seventeen months after the policy was written. There was in fact, at the time of the loss, and at the time of the acceptance of the amount of the judgment, no earned premium beyond that paid in cash. Nor is there any recital that default shall entitle the company to treat the premium as earned. There is therefore no tenable ground upon which the company can justify its act in taking the insured's money and yet repudiate liability for the loss. The moment the risk attached, the premium paid was beyond recovery by the insured: *Standley v. Northwestern etc. Ins. Co.*, 95 Ind. 254; *Continental Life Ins. Co. v. Houser*, 111 Ind. 266.

His right is correspondent to his burden; he cannot get his money back, but he can enforce his contract, and his contract is continuous for the period named, and indivisible as to the property described. When the company accepted payment of the entire premium, it waived all right to forfeit the policy, for as the insured can get back no part of the premium paid, neither can the company escape the performance of its part of the contract. It cannot have the benefit and escape the burden. The only natural and reasonable construction which can be placed upon the conduct of the company is, that it elected to waive its right to take advantage of the default in payment. And this is the only legal and equitable construction that can be given to its acts; for it cannot repudiate the policy in part and confirm it in part. It can no more accept and retain the entire premium without confirming the contract than can the insured recover back the premium paid after the risk has attached. It was in the power of the company to accept or refuse payment; it made its election, and it must abide the legal consequences of that act. It was a voluntary performance, with full knowledge of all the material facts, and the election was complete.

We have studied with care the cases referred to by the appellant's counsel, and we cannot regard them as sustaining

the position counsel assume; for we do not believe that in any of them is the doctrine asserted that under such a policy as that before us the insurance company may, with knowledge of the loss and notice that the assured is affirming the validity of the policy, accept and retain the entire premium and yet refuse to pay the loss. In *Klein v. New York etc. Ins. Co.*, 104 U. S. 88, there was no offer to pay the premium until after the death of the assured, and then the offer was refused, the company declining to accept the money and offering to pay the surrender value of the policy. The policy in the case of *Wall v. Home Ins. Co.*, 36 N. Y. 157, contained a provision that in case of default in the payment of the note given by the insured "the premium shall be considered as earned," and the evidence showed that after the loss the insured offered to pay the premium, and that it was declined. The evidence also showed that before knowledge of the loss the agent of the insurance company agreed that "he would not press for payment of the note; that it might lie over for a short time." The court held that there could be no recovery. The court was, as we believe, in error in holding that there was no waiver of payment sufficient to excuse the insured; for there are well-reasoned cases which assert a different doctrine, and among them our own and one or more in New York: *Sweetser v. Odd Fellows' etc. Ass'n*, 117 Ind. 97; *Home Ins. Co. v. Gilman*, 112 Ind. 7. But granting that the decision is sound, it cannot aid the appellant, for the reason that in this instance there was an acceptance of the entire premium with full knowledge of all the facts. In *Williams v. Albany City Ins. Co.*, 19 Mich. 451, 2 Am. Rep. 95, it was held that where the policy provided that in case default was made in the payment of a premium note "the premium shall be considered as earned," acceptance of the premium after knowledge of the loss did not preclude the company from taking advantage of the provisions of the policy declaring that it should be inoperative during the time the premium remained unpaid. The decision rests for authority entirely upon *Wall v. Home Ins. Co.*, 36 N. Y. 157, and we are not inclined to regard it as of controlling influence, for the reason that there is an essential difference between the provisions contained in the policy in that case and those found in the policy before us. We are, indeed, not convinced of the soundness of the decision, but it is not necessary to do more than decline to regard it as in point, and in this we are fully supported by the later case of

Yost v. American Ins. Co., 39 Mich. 531, where the court expressed an opinion as to the force and meaning of the provision in the policy to which we have referred.

The only case directly in point referred to by counsel, or discovered by us, is that of *Joliffe v. Madison Mutual Ins. Co.*, 39 Wis. 111; 20 Am. Rep. 35. That case received careful consideration, and the decision sustains the position of the appellee. The court discriminates the case before it from those in which the policy provides that in case of default the payment shall be deemed to be earned, and builds its decision principally upon the ancient doctrine that where there is no risk there is no right to a premium. It is declared that Mr. May's statement of the law is correct, and the court quotes what is said by him in speaking of a contract of insurance, and that is this: "It is, moreover, a conditional contract; for when no risk attaches no premium is to be paid, or if paid, must, in the absence of fraud, be returned to the assured. In point of fact, the contract is to pay the premium on condition that the risk is run, and the refunding a premium is of frequent occurrence in maritime insurance, and that, too, in cases where it is entirely optional with the assured whether the property insured shall be put at hazard or not, as when the ship is never dispatched by the owner on the projected voyage. The language of Lord Mansfield in *Tyrie v. Fletcher*, Cowp. 668, is explicit: 'When the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned.' And this principle is alike applicable to all policies of insurance": May on Insurance, sec. 4. The court applied this doctrine to the case before it, and said "But the defendant received the whole cash premium for which the note was given. By so doing, it received compensation for the risk covering the time when the loss occurred, and we think that it cannot now be heard to allege that at the time of the loss it had no risk on the property insured. The acceptance of the full premium after notice of the loss is entirely inconsistent with the claim that the risk was suspended when the loss occurred." The decision in *Lyon v. Travelers Ins. Co.*, 55 Mich. 141, 54 Am. Rep. 854, while not directly in point, does assert a doctrine which bears strongly upon the case under investigation. In the case referred to, orders for the premium were drawn upon a railroad company, but were not paid, and the court held the insurance company

liable, saying, among other things, that "a forfeiture is not favored either at law or in equity, and a provision for it in a contract will be strictly construed, and courts will find a waiver upon slight evidence, when the equity of the claim made, as in this case, is, under the contract, in favor of the insured." It is, however, insisted by the counsel for the appellant that the case of *Bane v. Travelers Ins. Co.*, 85 Ky. 677, is opposed to the case last mentioned, but we think counsel are in error; for the Kentucky court puts its decision upon the ground that the assured had not earned the wages which he assumed to assign, and declares that in this respect the case differs from *Lyon v. Travelers Ins. Co.*, 55 Mich. 141; 54 Am. Rep. 354.

In *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, the court said: "But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act, or incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." Other cases assert a similar doctrine: *Osterloh v. New Denmark etc. Ins. Co.*, 60 Wis. 126; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Farmers' etc. Ins. Co. v. Bowen*, 40 Mich. 147; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494.

In the case last cited, the court, in speaking of the duty of the insurance company, said: "But it cannot treat the policy as valid to collect the premium, and void for the payment of losses. The note having been paid after the loss, the acceptance of the money waived the condition of forfeiture in the policy, and it was valid and subsisting at the time of the loss."

The case before us falls within the principle declared in the cases cited. The acceptance of the money was after the loss, and after the company knew that the assured was affirming the validity of the policy, and his right to recover the loss. It knew that he did not regard the policy as suspended, and by accepting the money it confirmed the contract as of the date of its execution.

We adjudge that the complaint makes a case sufficiently strong to drive the appellant to answer.

Judgment affirmed.

FIRE INSURANCE—FORFEITURES. — Forfeitures are not favored by the courts, and they are inclined to grasp any circumstance upon which to establish a waiver on the part of the insurance company: *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51.

INSURANCE COMPANY, WHAT ACTS OR WORDS ON THE PART OF, CONSTITUTE A WAIVER of a forfeiture of a policy: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809; *Bonsert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739, and note. Knowingly accepting a premium for a policy under conditions which render it invalid is a waiver of the right to insist upon a forfeiture: *Germania F. Ins. Co. v. Hick*, 125 Ill. 361; 8 Am. St. Rep. 384, and note.

PENSO v. McCORMICK.

[125 INDIANA, 114.]

GREATER CARE REQUIRED IN DEALING WITH CHILDREN OF TENDER YEARS THAN WITH PERSONS OF AGE OF DISCRETION. — Persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion; and greater care is required to avoid injury to such children, even when they are trespassers.

LIABILITY FOR INJURY TO INFANT FROM FALLING INTO CONCEALED PITFALL.

— Where the owners of a saw-mill, situated in a public part of a town, near a public highway, have, by their knowledge and acquiescence, given license to children of tender years to use their uninclosed lot as a playground, and without any warning to them, or others, construct a pitfall in the ground where such children were accustomed to play, which they fill with burning embers, and which gave forth no signs of its condition or the danger in stepping upon its covering, and while in this condition a child of tender years enters upon it, as he was accustomed to do, without any knowledge of its changed condition, and is severely burned and injured, such owners will be liable for the injury.

ACTION to recover damages for negligence. The opinion states the case.

J. Applegate and O. R. Pollard, for the appellant.

J. A. Sims, for the appellees.

OLDS, J. This is an action brought by the appellant against the appellees for damages resulting to William Pensó, an infant of the age of eight, by falling into a pit of hot ashes and burning embers while crossing the mill-yard of the appellees.

Appellees demurred to the complaint for want of facts. The court sustained the demurrer, to which ruling the appellant excepted, and prosecutes this appeal, and asks a reversal on the ground that the court erred in sustaining the demurrer.

The complaint alleges the appellant, William Pensó, to have been an orphan about eight years of age at the time of the happening of the grievance complained of, and that for seven years prior to that time he had resided with a family in the town of Rockfield, in Carroll County, Indiana; that the appellees were conducting, and for many years had conducted, a saw-mill in said town; that the mill was situated in the most public part of the town, or village, near to a public highway and railway station in said town; that the grounds surrounding said mill were not and never had been inclosed, and were used by the citizens of town as a passageway from one street to another, and also used for a playground for the children of said town, including the appellant, Pensó, with the knowledge, approbation, and consent of the appellees; that for months immediately prior to the twenty-first day of May, 1887, the time of the injury to said appellant, there was a mound on said mill-grounds from four to five feet high, made and formed by the appellees of ashes and cinders before that time accumulated at the mill and deposited on the mill-grounds, from which mound of ashes all heat had escaped, and such mound constituted a favorite playground for the children of the town, including the appellant, where they were accustomed to gather and play up until said twenty-first day of May, 1887; that upon said day, without giving any notice to the appellant, or to the public generally, the appellees excavated and removed from one side of the base of said mound about twenty bushels of ashes, and filled the cavity so made with embers and cinders, hot, glowing, and burning, from the fire-box of the engine; that appellees erected no barriers about the smoldering mass of embers and cinders, nor did they give any warning that it was dangerous to step upon it; that in a very short time the entire surface ceased to give out light, heat, and smoke, and presented the appearance of the remainder of the mound, and to all appearance all parts of the mound were the same in condition and structure, but in fact that portion so recently deposited was a smoldering, burning heap beneath the surface, and while in such condition, on said day, the appellant was sent by the persons with whom he lived for the cows; that the cows were then and before that time accustomed to pasture on the commons in said town, and the uninclosed land in and about said mill-yard; that appellant, while in search of the cows, passed in and attempted to cross said mill-yard, passing

onto the top of the mound safely, and seeing nothing to admonish him of any danger or the condition of the recently deposited embers and cinders, in pursuing his course attempted to pass down upon the other side of the mound, when, without any fault upon his part, he stepped into the mass of burning embers and cinders, and received very severe injuries.

The allegations of the complaint show that the appellees, in removing the ashes, embers, and cinders from their saw-mill, and depositing them on their uninclosed mill-yard, in a public place in the town and near to a public street, had built a mound, and that for several months prior to the time of appellant's injuries, the embers had ceased burning, and the mound had cooled, and was in a safe condition to pass over, and the citizens of the town had been accustomed to pass over it for months, and during which time the children of the town, including appellant, had been accustomed to play upon the mound so built of ashes, embers, and cinders; that without any notice or warning, the appellees, on the day of the injury, had excavated a hole or pit in one side of the heap or mound, and refilled it with hot and burning coals, embers, and cinders, the top of which immediately cooled, and gave no signs of any change in the condition of the mound, or any warning of danger to those who had been accustomed to pass over or play upon the mound. And the question is presented, whether, under such circumstances, the owners of the mill were not required, in making such change and creating such a dangerous pit in such a public place and near to a public street, to give proper notice of the changed condition of the mound, and of the danger imminent from passing over it.

As a general rule, the owner of land has the right to the sole use and occupation of it, but such use and enjoyment of it must be exercised with a due regard for the public good and with a reasonable and humane regard for the welfare and rights of others.

The case of *Young v. Harvey*, 16 Ind. 314, was brought to recover the value of a horse killed through the negligence of the defendant. The facts were: Harvey, the defendant, commenced digging a well upon a lot owned by him; he sunk it to a depth of six feet, being forty-two inches across, and then abandoned it. It was located in an uninclosed lot, near the line of a street, in a suburb of Indianapolis. It remained a long time in this condition, sometimes partly covered with loose boards. Stock was allowed to run at large, and did run

at large, on the commons in the vicinity of this lot, of which the lot formed a part. On a certain day the plaintiff's horse fell into the hole and was killed. As to whether the action could be maintained, or not, the court says: "Whether it can be, or not, depends upon the degree of probability there was that such accident might happen from thus leaving exposed the partially dug well, considered, perhaps, in connection with the usefulness of the act or thing causing the danger: *Durham v. Musselman*, 2 Blackf. 96; 18 Am. Dec. 188. If the probability was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard that community from the danger to which the pit exposed its members, in person and property, he is liable to an action for loss occurring through his neglect to perform that duty. We think any reasonable man of ordinary understanding and extent of observation of the ways of life would say that the probability of injury to others, under the circumstances, from leaving the well in question in the condition it was, was not only strong, but that it amounted almost to certainty."

The case of *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727, was brought to recover damages suffered by the plaintiff for falling into an excavation for a cellar recently made by the defendant upon a lot adjoining a street and sidewalk in the city of Terre Haute, the defendant having negligently failed to guard said excavation, or to place any signals to warn passers-by of the danger, it appearing that there had been a path diverging from the sidewalk and passing over the defendant's lot, which had been used by persons passing along the street for a number of years. The court in that case says: "In the case at bar, we think that the fact that for a long period the public using the sidewalk had been permitted to use the place where the plaintiff fell as a part of the sidewalk made it the duty of the defendant to guard the excavation made at that place, and that the jury were authorized to find from the evidence that the plaintiff did not, by her own negligence, contribute to her injury."

In *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, it was held that where a person for a long time allowed a portion of his lot to be used as a part of the street, and made an excavation in his lot about ten feet from the street, by which a person was injured, he was liable.

In *Binford v. Johnston*, 82 Ind. 426, the court says: "There

are many well-reasoned cases which, carrying the doctrine still further, hold that one who places a dangerous thing in a position where it is likely to cause injuries to others is liable to a child who is injured, although he may be a trespasser."

In the case of *Harriman v. Pittsburgh etc. Ry Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, it is held that where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof; and it is bound to exercise care accordingly, proportioned to the probable danger to persons using its road. The injury in that case was caused by the explosion of a signal torpedo left upon the track, and the court, after a careful review of the authorities, says: "The defendant, knowing of the probable use of its roadway by children, from the previous habitual use thereof by the public, long acquiesced in by the defendant, ought reasonably to have anticipated such use by the plaintiff and other children; and its servants, in placing and leaving the unexploded torpedo, an innocent-looking but highly dangerous and destructive article, where they might reasonably anticipate plaintiff and other children would be likely to go and handle it, and be injured, thus placing a new and hidden danger in their way, without notice or warning, failed to use such care as a person of ordinary prudence would and ought under the circumstances."

In the case of *City of Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, the court says: "The excavation into which the appellee's son fell was made in Spruce Street, at a point where it crosses Pleasant Run. It was made in the bed of a shallow stream, and left alone unguarded on a July day, with knowledge that children were accustomed to play in the vicinity. The city must be held to know that children are attracted to such a place in July weather. They were not intruders. It was gross carelessness on the part of the city, with such knowledge, to leave an unguarded pit filled with water in the street, into which an unsuspecting child might fall." The court, in the same case, further says: "Conceding all that has been contended for in respect to the condition of the pit, the levee, and the street and run at the time and place of the sad occurrence, the fact remains that the city made an excavation in the street, at a place where it knew children liv-

ing in the vicinity were accustomed to play, and where they had a right to be, at all proper times, without being intruders upon the premises, or invaders of the rights of any one. In the absence of the workmen, that the children went into the shallow stream to play, was precisely what the appellant might have expected. It owed them the duty to guard the pit in the street so that they might not fall into it and perish. Neither the father nor mother knew of, nor had they reason to suspect, any danger at the place in question. It was therefore not negligence to permit the child to be, with another, as the mother supposed it was, at such a place so near its home."

It is a well-recognized doctrine that persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion, and that greater care is required to avoid injury to them, even when they are trespassers: *Indianapolis etc. R'y Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387.

The facts as pleaded in this case show that the appellees, after having created the mound of ashes upon their uninclosed lot in a public place in the town, near a public street, had for months known of and permitted its use by the public to pass over from one street to another, and as a play-ground for the appellant, a child only eight years of age, and other children of the town, which use they had known and acquiesced in to such an extent as we think amounted to a license to such children to use the same for such purpose; and under such circumstances, instead of using care to avoid injury to such children, they made an excavation and filled it with hot and burning embers, the top of which, being exposed, immediately cooled and presented its former condition upon the surface, but underneath was a hidden mass of burning embers and fire, which, under the circumstances, it was but reasonable to suppose and to anticipate that children of tender years who were accustomed to use the same as a play-ground and as a passage-way would enter upon and into and be severely injured.

Under the facts alleged in the complaint, it was but reasonable to expect that would occur which did in fact occur; viz., that a child accustomed to pass over and play upon the heap, with the knowledge and acquiescence of the appellees, would enter upon and sink into the hidden pitfall constructed by the appellees, and be severely and dangerously burned and in-

jured. We do not hold or intend to hold that the appellees would be liable for the ordinary use of their lot in piling hot ashes taken from their mill upon it in the usual way, or that persons are liable ordinarily for mere negligence in the use of their own property, as against trespassers. But the allegations of the complaint show a wanton disregard of the rights and safety of others. It shows that the appellees had, by their knowledge and acquiescence, given license to children of tender years to use their uninclosed lot as a play-ground, and without any warning to them or others they constructed a pitfall in the ground where such children were accustomed to play, which they filled with burning embers, and which gave forth no signs of its condition or the danger in stepping upon its covering, and while in this condition the plaintiff, a child of tender years, entered upon it as he was accustomed to do, without any knowledge of its changed condition, and was severely burned and injured, and the appellees are liable, under such circumstances, to respond in damages.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed, at costs of appellees, and for further proceedings in accordance with this opinion.

CHILDREN OF TENDER YEARS, CARE WITH RESPECT TO. — A greater degree of care must be used towards children of tender years than towards persons of maturer years, under similar circumstances: *Note to Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 592; *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 395; 98 Am. Dec. 175, and note; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318, and note 321, 322.

WATKINS v. WATKINS.

[125 INDIANA, 163.]

DECREE OF DIVORCE VOID, WHERE NEITHER PARTY RESIDES IN JURISDICTION. — Where neither the plaintiff nor the defendant is a resident of the state or territory in which a decree of divorce is pronounced, its courts have no jurisdiction, and their decree is void. To give validity to the decree of a court in a suit for divorce, one, at least, of the parties must be a resident of the state or territory in which the decree is rendered. The courts of one state cannot, by judgment or decree, fix the status of the citizens of another state. A reply to an answer alleging that the defendant had procured a divorce from the plaintiff in Montana, having been a resident of that territory for more than the period required to give its courts jurisdiction, which alleges that neither of the parties was a resident of Montana at any time, is therefore good.

ACTION for divorce. The opinion states the case.

A. P. Twinsham, for the appellant.

H. A. Yeager, for the appellee.

ELLIOTT, J. The appellee, by her complaint, sought a divorce from the appellant, and the latter answered in bar of the action that he had obtained a decree of divorce in the territorial court of Montana. The answer sets forth at full length the proceedings in the suit brought and prosecuted to judgment in that court.

It appears from the answer that the appellant made an affidavit that he had been a resident of the territory for more than one year prior to the time the suit was instituted, and that the territorial statute required that a plaintiff in a suit for divorce should have been a resident of the territory for one year next preceding the filing of his complaint. The appellee, in her reply, alleges that the appellant obtained the divorce in the territorial court by fraud; that he was not a resident of Montana at any time, but has always been a resident of this state; that she has always been a resident of Indiana; that the territorial court had no jurisdiction; that the appellant had no cause for divorce; that he attempted to procure a divorce for the fraudulent purpose of avoiding the duty of maintaining his children; that in the year 1882 he began a suit for divorce in this state, and the court refused to grant it.

There is much in the reply that ought not to be found in such a pleading; but surplusage does not vitiate, and the allegation that neither of the parties was a resident of Montana makes the reply good. Where neither the plaintiff nor the defendant is a resident of the state or territory in which a decree of divorce is pronounced, its courts have no jurisdiction, and their decree is void. The subject of divorce is a peculiar one, and to give validity to the decree of a court, one, at least, of the parties must be a resident of the state or territory in which a decree dissolving the marriage is rendered: 2 Bishop on Marriage and Divorce, sec. 144.

Marriage gives to the parties a peculiar legal *status*, and the courts of one state cannot, by judgment or decree, fix the *status* of the citizens of another state. The courts of Montana could not therefore by any decree fix the *status* of citizens of Indiana. Marriage is more than a mere civil contract, and the rules which govern the general subject of marriage and divorce are, in many essential respects, different from

those which govern ordinary business contracts. The question is, however, so completely set at rest by the authorities that a discussion is unnecessary: *Tolen v. Tolen*, 2 Blackf. 407; 21 Am. Dec. 742; *Hood v. State*, 56 Ind. 263; 26 Am. Rep. 21; *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299; *Kerr v. Kerr*, 41 N. Y. 272; *Dutcher v. Dutcher*, 39 Wis. 651; *Davis v. Commonwealth*, 13 Bush, 318; *State v. Armington*, 25 Minn. 29; *Reed v. Reed*, 52 Mich. 117; 50 Am. Rep. 247; *Strait v. Strait*, 3 McAr. 415; *Sewall v. Sewall*, 122 Mass. 156; 23 Am. Rep. 299; *Van Fossen v. State*, 37 Ohio St. 317; 41 Am. Rep. 507; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Litowitch v. Litowitch*, 19 Kan. 451; 27 Am. Rep. 145.

As the subject of marriage and divorce is a peculiar one, and different in many respects from ordinary contracts, it is not necessary to examine the decisions in cases growing out of such contracts; indeed, all that can be properly done is to ascertain and declare the rules applicable to the subject of divorce, for other rules are neither relevant nor material.

What we have said in disposing of the questions arising on the reply disposes of the questions presented by the evidence. Judgment affirmed.

DIVORCE — VALIDITY OF DECREE. — The power to grant a decree of divorce is statutory: *Weber v. Weber*, 16 Or. 163. The court has jurisdiction to grant a decree of divorce even against a non-resident, if the plaintiff has resided in the state for the sufficient statutory period prior to the filing of the complaint: *Jones v. Jones*, 67 Miss. 195; 19 Am. St. Rep. 299, and note 300, 301; *Morrison v. Morrison*, 64 Mich. 53. But where neither party is a resident of the state, a divorce cannot be granted: *Haymond v. Haymond*, 74 Tex. 414. Mere temporary residence in the state for the sole purpose of obtaining a divorce is not sufficient to confer jurisdiction: *Colburn v. Colburn*, 70 Mich. 647. A decree of divorce in another state cannot affect an insane pauper defendant in Massachusetts, when she was served with a notice of the proceedings while at the hospital, but was in no manner represented at the trial: *Inhabitants of Oummington v. Inhabitants of Belchertown*, 149 Mass. 223. The court should be liberal in setting aside defaults in divorce suits, where it appears at all probable that there was no service upon defendant, personally or constructively: *McBlain v. McBlain*, 77 Cal. 507; *Hemphill v. Hemphill*, 38 Kan. 220; *Wadsworth v. Wadsworth*, 81 Cal. 182; 15 Am. St. Rep. 33. A decree of divorce entered by consent is binding upon the parties, unless impeached for mistake or fraud: *Brick v. Brick*, 65 Mich. 230. Where the court had jurisdiction over the parties and the subject-matter, a decree of divorce is conclusive as against a petition for review after the expiration of the term at which it was entered: *Sallebury v. Sallebury*, 92 Mo. 633.

OPP v. WARD.

[25 INDIANA, 261.]

SUBROGATION, DOCTRINE OF, WHEN APPLIED. — To justify the application of the doctrine of subrogation, a person must have paid a debt due to a third person, for the payment of which another was in equity primarily liable; and the person paying the debt must, in doing so, have acted under the compulsion of saving himself from loss, and not as a mere volunteer.

GUARANTOR OF JUDGMENT CREDITOR ENTITLED TO SUBROGATION TO RIGHTS OF SURETY ON APPEAL BOND WHEN. — Where a person becomes guarantor for a lessee, and the lessor recovers judgment against the lessee for his failure to perform the covenants guaranteed, and the lessee appeals from this judgment, which is affirmed, and the lessor then sues the guarantor, and recovers judgment against him for the rent of the demised premises from the date of the rendition of the judgment against the lessee up to the time of his death, which judgment the guarantor pays, the lessee having paid the judgment against himself, the guarantor is entitled to recover the amount so paid by him from the surety on the appeal bond, and no demand before suit is necessary. The interposition of the second surety having been the means of involving the first in the liability which he was ultimately compelled to pay, the equity of the first is complete, and he is entitled, on the principles of subrogation, to stand as though the creditor had assigned the appeal bond to him. If the first surety suffers loss or his liability is increased or prolonged so as to render him liable to suffer loss by the intervention of the second, the latter assumes all the risk resulting from his voluntary interposition.

THE opinion states the case.

B. W. Langdon and T. F. Gaylord, for the appellant.

R. P. Davidson and R. P. Davidson, Jr., for the appellees.

MITCHELL, J. The questions for decision arise upon the following facts: In 1876, Wilson and Hanna leased certain premises in the city of Lafayette to James H. Telford, who agreed to pay a stipulated sum as rent, and to surrender the premises at the end of one year. Ward became bound as guarantor for the faithful performance by the lessee of the covenants or agreements contained in the lease. Telford went into possession, but refused to surrender at the end of his term, and the lessors recovered judgment against him for possession, and for \$164.44 damages. Telford appealed to this court, Opp becoming surety on his appeal bond, by means of which all proceedings to enforce the judgment were suspended, and the lessors were thereby kept out of possession from the thirty-first day of January, 1878, the date of the judgment, until the twentieth day of May, 1881, the judgment having been affirmed on the fifteenth day of February, 1881: *Telford v. Wilson*, 71 Ind. 555. Thereupon Wilson and

Hanna brought suit and recovered judgment against Ward, on his contract of guaranty. The amount recovered was \$676, besides costs, the amount specified being the rental value of the leased premises from the date of the judgment appealed from to the sixteenth day of July, 1880, at which date Telford died, having previously paid the judgment recovered against him for damages. The judgment against Ward was afterwards affirmed by this court on appeal: *Ward v. Wilson*, 100 Ind. 52; 50 Am. Rep. 763. Ward subsequently paid the judgment recovered against him, which, with accumulated interest and costs, amounted, when paid, to \$838.30, and thereupon he brought this suit against Opp on the appeal bond. Wilson and Hanna were made parties defendant to answer. They disclaimed any interest in the appeal bond, except that they claimed judgment in their favor for a small amount of costs which remained unpaid in their suit against Telford. The finding of the court was in favor of the plaintiff below.

If the plaintiff was entitled to recover, it was because after paying the judgment recovered by Wilson and Hanna against him for the rent that accrued pending the appeal taken by Telford he became subrogated to their rights and remedies upon the appeal bond.

Subrogation is an equitable device, and rests upon the principles of justice and equity which it is intended to accomplish. The doctrine is well established that one who occupies the attitude of a surety will be subrogated to all the rights, remedies, and securities which the creditor held, in case the former has been compelled to pay a debt which, in equity and good conscience, should have been paid by another. Payment by the surety is equivalent to a purchase from the creditor, and operates as an equitable assignment of the debt, and all its incidents, to the former: *Thomas v. Stewart*, 117 Ind. 50; *Pence v. Armstrong*, 95 Ind. 191; *Arbogast v. Hays*, 98 Ind. 26; *Acer v. Hatchiss*, 97 N. Y. 395. These principles are familiar, and of frequent application.

The application of the doctrine of subrogation requires, —
 1. That a person must have paid a debt due to a third person, for the payment of which another was in equity primarily liable; and 2. That in paying the debt the person paying acted under the compulsion of saving himself from loss, and not as a mere volunteer: *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534; *Hoover v. Epler*, 52 Pa. St. 522; *Southall v. Parish*, 85 Va. 403; Sheldon on Subrogation, sec. 240.

It is insisted, however, that in the case of successive sureties who become bound by separate obligations for the payment of the same debt, the equity of the last surety is superior to that of the first, and that as the liability of the plaintiff below, as guarantor, was prior in point of time to that of the appellant as surety on the appeal bond, both being bound for the same debt, the equity of the latter was at least equal, if not superior, to that of the former. This view is not maintainable in a case like the one under consideration. It is quite true the plaintiff below became liable, as guarantor, for the payment of all rent, as well as for all damages growing out of the unlawful detention of the property by the tenant. But it is also true that his liability, which theretofore was uncertain and contingent, became certain and fixed when the landlord recovered judgment for the possession of the leased premises, and for damages for their unlawful detention. The guarantor had the right to pay the amount of the judgment recovered against his principal, and thus put an end to his liability at once. By the voluntary intervention of the appellant in becoming surety on the appeal bond, all further proceedings on the judgment, by which the landlord was awarded the right of immediate possession, were stayed, and the hands of the guarantor were effectually tied until the appeal was disposed of. It is settled that the sureties on an appeal bond given by a judgment defendant on appeal from a judgment for the possession of real estate are liable, not only for the money judgment, but also for the rental value of the real estate pending the appeal, to an amount not exceeding the penalty of the bond: *Opp v. Ten Eyck*, 99 Ind. 345; *Hays v. Wilstach*, 101 Ind. 100; *Graster v. De Wolf*, 112 Ind. 1; *Stults v. Zahn*, 117 Ind. 297.

Upon the determination of the appeal, the landlord had his election to sue on the appeal bond and recover the rental value of the premises unlawfully detained, or to proceed against the guarantor on the lease. He adopted the latter alternative. If he had sued on the appeal bond and recovered judgment against the surety, it is quite certain that the latter would have had no standing in a court of equity to recover from the guarantor. This is so because he occupies the position of a volunteer, and, as is pertinently said in *Acer v. Hotchkiss*, 97 N. Y. 395, "One who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity": *Gans v. Thieme*, 93 N. Y. 225. Having intervened as a volun-

teer, and by his interposition stayed proceedings on the judgment for possession, to the prejudice of the guarantor, whose liability had become fixed and at an end, so far as respects future rents, it must be considered in equity that he did so upon the condition that he would take the place of the guarantor from that time forward: *Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625; *Hinckley v. Kreits*, 58 N. Y. 583; *Schnitzel's Appeal*, 49 Pa. St. 23.

The interposition of the second surety having been the means of involving the first in the liability which he was ultimately compelled to pay, the equity of the first is complete, and he is entitled, on the principles of subrogation, to stand as though the creditor had assigned the appeal bond to him: *Brandenburg v. Flynn*, 12 B. Mon. 397; *Bohannon v. Combs*, 12 B. Mon. 563; Brandt on Suretyship and Guaranty, sec. 227; Sheldon on Subrogation, sec. 181.

One who intervenes without the solicitation of a surety, and by his interference ties the hands of the latter so as to prolong or add to his liability, and prevent the effectual enforcement of the judgment or process against the principal, as it might have been but for his intervention, cannot be made to say that he occupies a position which should commend him to the favor of a court of equity.

The conclusion above stated is in no wise in conflict with that reached in *Kane v. State*, 78 Ind. 103. In that case the principal had given bond with sureties to the state, conditioned, among other things, that he would pay all fines and costs which might be assessed against him for any violation of the statute regulating the sale of intoxicating liquors. Fines were afterwards assessed against him, which, with costs, amounted to a considerable sum. These were afterwards paid by one who became replevin bail for the stay of execution, and it was correctly held that the bail became subrogated to the rights of the state, and entitled to maintain a suit against the sureties on the bond. In that case, however, the liability of the sureties on the bond was in no way enlarged or prolonged, nor was the situation of the sureties in any way changed by the intervention of the replevin bail. Possibly, if it had been shown that the principal had property out of which the fine and costs could have been made in case execution had issued when the fines were assessed, and that he had since disposed of the property to the prejudice of the sureties on the bond, a different conclusion might have been reached.

Where the first surety suffers loss, or where his liability is increased or prolonged so as to render him liable to suffer loss by the intervention of the second, the latter assumes all the risk arising from his voluntary interposition. In such a case, there is no injustice in requiring the second surety to perform his undertaking according to its terms, since by his intervention he has been the means of involving the first surety in a liability which otherwise he might have escaped. The conclusion above is not in conflict with that reached in *Holmes v. Day*, 108 Mass. 563.

It is undoubtedly true, as the appellant contends, that a surety will not be subrogated to the equities or securities of the creditor until the claim of the latter, for the payment of which he has taken security, has been fully satisfied: *Vert v. Foss*, 74 Ind. 565; *Sheldon on Subrogation*, sec. 127. The reason is, that the law will not permit the right of action to enforce the security to be divided between the creditor and the surety, nor allow the debtor to be subjected to the inconvenience of two actions instead of one.

In the present case the creditors were made parties to the suit. They disclaimed any interest in the bond, except as to some costs, and the finding of the court fails to show that they are entitled to recover anything on the bond. All those who had any interest in the bond were before the court, and it was not so material whether they were plaintiffs or defendants, so that the judgment settled the rights of all the parties before the court: *Morningstar v. Cunningham*, 110 Ind. 323; 59 Am. Rep. 211; *Horn Ins. Co. v. Gilman*, 112 Ind. 7. Upon the facts as found, it appears, therefore, that the creditor's claim has been fully satisfied, and that the surety cannot be again vexed by another suit on the appeal bond. There was no necessity that a demand should have been made before instituting the suit. It does not appear that the amount of the recovery was too large.

There was no error.

The judgment is affirmed, with costs.

SUBROGATION. — As to when the doctrine of subrogation applies, see *Wilson v. Mayberry*, 75 Wis. 191; 17 Am. St. Rep. 193, and note; *Phoenix Ins. Co. v. First Nat. Bank*, 85 Va. 765; 17 Am. St. Rep. 101, and note; *Curry v. Curry*, 87 Ky. 667; 12 Am. St. Rep. 504, and note. As to the right of sureties to subrogation, see *Carlier v. Jones*, 5 Ired. Eq. 196; 49 Am. Dec. 425, and note, note to *New Bedford Ins. Co. v. Hathaway*, 45 Am. Rep. 295-297.

WOODWARD v. SEMANE.

[25 INDIANA, 280.]

AGREEMENT TO YIELD PROPERTY IN EXCHANGE FOR PROPERTY—CONTRACT OF SALE NOT BAILMENT.—An agreement by which one party agrees to deliver to another wheat, for which the latter is to deliver, on request a designated number of pounds of flour and bran for each bushel of wheat delivered, is essentially a contract of sale, and not of bailment. The party delivering the wheat is not entitled to the flour and bran produced from the wheat delivered by him to the other party, and the latter does not undertake to restore the wheat either in its original or in its altered form. If, therefore, a person agrees to furnish to a miller wheat for which the latter agrees to deliver to him, on request, a designated number of pounds of flour and bran for each bushel of wheat delivered, the flour and bran to remain in the possession of the miller, subject to delivery upon demand of the other party, and before the delivery of all the flour and bran the miller's mill and warehouse, with their contents, are, without his negligence or wrong, consumed by fire, the miller will be liable to such other party for the flour and bran which had not been delivered.

THE opinion states the case.

M. S. Robinson and J. W. Lovett, for the appellants.

O. L. Henry and H. O. Ryan, for the appellees.

ELLIOTT, J. The appellants were dealers in grain, conducting a warehouse and a flouring-mill at the town of Lapel. The appellees agreed to furnish wheat to the appellants, for which the appellants were to deliver to them, on request, a designated number of pounds of flour and bran for each bushel of wheat delivered. The flour and bran were to remain in the possession of the appellants, subject to delivery upon the demand of the appellees. Before the delivery of all of the flour and bran to the appellees, the mill and warehouse of the appellants were burned, and the flour and bran destroyed. The fire was not caused by any negligence or wrong of the appellants.

It is the law of this jurisdiction, as well as of many others, that where a warehouseman receives grain on deposit for the owner, to be mingled with other grain in a common receptacle from which sales are made, the warehouseman keeping constantly on hand grain of like kind and quality for the depositor, and ready for delivery to him on call, the contract is one of bailment, and not of sale: *Rice v. Nixon*, 97 Ind. 97; 49 Am. Rep. 430, and authorities cited; *Bottenberg v. Nixon*, 97 Ind. 106; *Schindler v. Westover*, 99 Ind. 395; *Lyon v. Lenon*, 106 Ind. 567 (570); *Preston v. Witherspoon*, 109 Ind. 457; 58

Am. Rep. 417; *Morningstar v. Cunningham*, 110 Ind. 328 (836); 59 Am. Dec. 211. But the case before us does not fall within the rule which the cases cited assert; on the contrary, it falls within an entirely different rule. There is here no agreement to restore to the original owner the identical property nor to restore to him property of like quality, nor is there any agreement to restore to him the product of the property. The agreement is to yield property in exchange for property, and this is essentially a contract of sale. The appellees were entitled to a designated quantity of flour and bran for each bushel of wheat delivered by them, but they were not entitled to the flour and bran produced from the particular wheat delivered by them to the appellants. There was therefore no undertaking to restore the wheat either in its original form or in an altered form. In *Brets v. Diehl*, 117 Pa. St. 589, 2 Am. St. Rep. 706, the court said: "The fundamental distinction between a bailment and a sale is, that in the former the subject of the contract, although in an altered form, is to be restored to the owner; whilst in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it." Our own decisions assert a similar doctrine, and by some of them it has been applied to cases very like the present: *Ewing v. French*, 1 Blackf. 353; *Carlisle v. Wallace*, 12 Ind. 252; 74 Am. Dec. 207; *Lyon v. Lenon*, 108 Ind. 567 (570). The decisions of other courts are in full agreement with our own: *Norton v. Woodruff*, 2 N. Y. 153; *Austin v. Seligman*, 21 Blatchf. 506; *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 100 (108); *Jones v. Kemp*, 49 Mich. 2.

Judgment affirmed.

CONTRACT, WHETHER A SALE OR BAILMENT. — As to whether a contract is one of sale or of bailment, see *Michering v. Bastron*, 120 Ill. 206; 17 Am. St. Rep. 302, and notes; note to *Brets v. Diehl*, 2 Am. St. Rep. 711-712.

BROWN v. JONES.

[125 INDIANA, 575.]

ACCEPTANCE OF BILL OF EXCHANGE — COPY OF, DOES NOT CONTROL AVERTMENTS OF COMPLAINT. — In an action upon a bill of exchange drawn by the defendant, payable to his own order, and by him indorsed to the plaintiff, the acceptance is not the foundation of the action, and a copy thereof filed with the complaint cannot control its averments.

BILL OF EXCHANGE PRESENTED AND PROTESTED IN TIME WHEN. — A thirty-day bill of exchange, made and accepted on the 11th of February, 1884, was properly presented for payment and protested for non-payment on the 15th of March, 1884, where the law governing the case allowed three days of grace after its maturity.

PRESENTMENT OF BILL OF EXCHANGE, WHAT CONSTITUTES. — If a bill of exchange is taken to the place designated in the acceptance as the place of payment, and the place is unoccupied and closed, and no one can be found to whom presentment for payment can be made, this amounts, in legal effect, to a presentment of the bill and a refusal to pay it. And there is no variance between a statement of these facts in the complaint, and a statement in the notice of dishonor that the bill was duly presented for payment.

NOTICE OF DISHONOR OF BILL OF EXCHANGE MAILED IN TIME WHEN. — A notice of the protest of a bill of exchange mailed by the notary the next day after the protest is made is mailed in time.

NOTICE OF PROTEST OF BILL OF EXCHANGE, WHAT SUFFICIENT. — A notice of protest of a bill of exchange in which figures are used to designate the months is not insufficient on that account. Such notice sufficiently describes the bill in these words: "A draft for \$500 on F. W. Pullen & Co., dated 2-11-84, payable thirty days after date, indorsed by —," and the words, "Done at the request of the First National Bank of Chicago," contained in such notice, are sufficient to show who held the paper and where it could be found.

ACTION on a bill of exchange. The opinion states the facts.

J. McCabe and E. F. McCabe, for the appellant.

C. V. McAdams, for the appellees.

BERKSHIRE, C. J. This was an action upon a bill of exchange drawn by the appellant, payable to his own order, and indorsed by him to the appellees.

The case has been here once before, but the questions now involved were not then before the court for consideration: *Brown v. Jones*, 113 Ind. 46; 3 Am. St. Rep. 623.

After the cause had been remanded to the trial court for a new trial, the appellees obtained leave to amend their complaint, and did amend it. Thereafter the appellant withdrew his answers, and filed a demurrer to the complaint.

The court overruled the demurrer, and the appellant saved an exception, and filed an answer in general denial.

The cause being at issue, the appellant moved the court for a judgment on the state of the pleadings. This motion was overruled, and an exception reserved, and afterwards a bill of exceptions was filed.

After overruling the motion of the appellant for judgment, the cause was submitted to the court for trial, with a request for a special finding. A special finding was thereafter returned, and to the conclusions of law therein announced the appellant saved an exception, and the court gave judgment for the appellees.

The errors assigned are as follows: 1. Overruling the demurrer to the complaint; 2. Overruling the motion for judgment on the state of the pleadings; 3. Error in the conclusions of law.

No specific causes for giving judgment in favor of the appellant upon the state of the pleadings were stated in his motion, and if for no other reason, the court might for this reason have very properly overruled the motion.

The motion should have been so drawn as to direct the court's attention to the questions sought to be raised thereby. It is the business of the court to consider such questions as its attention may be called to, if they are properly before it, but none other. But counsel for the appellant, in their argument, inform us that the motion was grounded on the insufficiency of the complaint; and that being the case, the same questions are raised by the first assigned error. We have carefully examined the complaint, and have no hesitation in holding it good.

The action rests upon a bill of exchange drawn by the appellant in favor of himself upon a firm doing business in the city of Chicago, state of Illinois. After its acceptance, it was indorsed to the appellees. The point is made that it does not appear by averment in the complaint whether the bill was indorsed before or after its acceptance; and on the assumption that the presumption arises that the indorsement was before its acceptance the argument is built. But as the complaint clearly shows that the bill was accepted before its indorsement, the argument can have no weight.

It is contended that the copy of the acceptance filed with the complaint limited the time of payment to twenty-eight days from the date of the bill, and hence it was not protested in time, and therefore the drawer was discharged. But as the acceptance is not the foundation of the action, the copy thereof

filed with the complaint cannot, as contended, control the averments of the complaint.

The court did not err in its conclusions of law. The bill was drawn on February 11, 1884, and accepted on the same day. It was a thirty-day bill. The acceptance was without qualification, except as to the place of payment. It required presentation at No. 136 East Kinzie Street, Chicago, Illinois, which was the place of business of the acceptors.

There were twenty-nine days in February, 1884, hence the bill was payable on the twelfth day of March, and when three days of grace are added thereto we have reached the 15th of said month, which was the day on which the bill was presented for payment and protested for non-payment; and this was the proper date for presentment and protest: *Helphenstine v. Vincennes Nat. Bank*, 65 Ind. 582.

The further point is made that there is a variance between the allegation in the complaint (which is supported by the special finding) and the notice which was given to the defendant of the dishonor of the paper. The complaint alleges, and the special finding so finds, that the bill was taken to the place designated in the acceptance as the place of payment, and that the building was unoccupied and closed, and no one could be found to whom presentment for payment could be made, while the notice states that the bill was duly presented for payment.

There is nothing in the distinction attempted to be drawn. In legal effect, the bill was presented and payment refused; at least, we cannot see how the appellant can be prejudiced because of the failure of the notice to recite the facts as they occurred: See *Henry v. State Bank*, 3 Ind. 216; Tiedeman on Commercial Paper, sec. 346; Randolph on Commercial Paper, sec. 1226.

After protesting the bill, the notary who executed the same mailed a notice thereof at the post-office in Chicago, Illinois, to the Citizens' Bank of Attica, Indiana, addressed to said bank at that place, with directions to said bank to forward the same to the appellant, his address not being known to the said notary. The said notice was mailed on the 16th of March, the next day after the protest was made, and was received by the said bank on the 18th of the said month, and mailed by the first mail going to the appellant's post-office after its receipt, and was received by the appellant on the 20th of said month.

It is contended that the notice was not mailed by the notary at Chicago within the proper time. We think there is nothing in this objection. The paper was payable in the state of Illinois, hence was controlled by the statutes of Illinois relating to commercial paper: 2 Daniel on Negotiable Instruments, sec. 986; *Shanklin v. Cooper*, 8 Blackf. 41; *Turner v. Rogers*, 8 Ind. 189; *Bryant v. Edson*, 8 Vt. 325; 80 Am. Dec. 472; *Andrews v. Pond*, 18 Pet. 65; *Allen v. Bratton*, 47 Miss. 119; *Ferdycs v. Nelson*, 91 Ind. 447; *Murphy v. Collins*, 121 Mass. 6. By the laws of that state there was a period of three days allowed as grace after the maturity of the bill, and forty-eight hours thereafter given to the notary in which to mail the notice. But the notice was mailed the next day after the protest, which was in time if controlled by the *lex mercatoria*: 2 Am. & Eng. Ency. of Law, 327, and cases cited. But it is contended that the notice was insufficient. It was as follows:—

“State of Illinois, County of Cook.

“CHICAGO, ILLINOIS, 3-15-1884.

“Sir,—A draft for \$500 on F. W. Pullen & Co., dated 2-11-84, payable thirty days after date, indorsed by —, has been this day by me protested for non-payment, and I hereby notify you that payment has been duly demanded, and the holder looks to you for payment, damages, interest, and costs. Done at the request of the First National Bank of Chicago.

ORVILLE PECKEN,

“To JAMES BROWN.

Notary Public.”

It is objected that the figures “3-15-1884,” and “2-11-84” have no legal significance, and that the appellant was not bound to take notice therefrom the date at which the notice was written, or of the date of the paper protested. There is nothing in this objection; the appellant knew as well, from the figures employed, the dates intended as though the names of the months had been written, and that was all that was necessary.

But it is contended that the bill was not so described in the notice as to give to the appellant the information that it was the paper sued on that was protested. We think otherwise.

From the facts stated, the appellant, if a person of ordinary intelligence, could but understand that the paper sued upon was the paper referred to in the notice, and especially so if he had drawn no other bill for the same amount, on the same date, directed to the same persons for acceptance. Upon the

sufficiency of such notices we cite the following authorities: *Henry v. State Bank*, 3 Ind. 216; 2 Am. & Eng. Ency. of Law, 408, and notes; Tiedeman on Commercial Paper, sec. 345; Randolph on Commercial Paper, sec. 1224.

But it is contended, lastly, that the appellant was not informed who held the paper, and where it could be found.

The notice stated that the bill was protested at the instance of the First National Bank of Chicago, and the appellant could but understand from this that it held the paper, at least that he could ascertain its whereabouts by inquiring of said bank: Randolph on Commercial Paper, sec. 1221; 2 Am. & Eng. Ency. of Law, 410, 411; Daniel on Negotiable Instruments, sec. 979. We quote from this last authority: "The notice need not state who is the holder of the bill or note, nor at whose request it is given."

We find no error in the record.

Judgment affirmed, with costs.

NEGOTIABLE INSTRUMENTS—PLACE OF PRESENTMENT.—As to the place of presentment of negotiable instruments for payment, see note to *Galpin v. Hard*, 15 Am. Dec. 643, 644; note to *Berg v. Abbott*, 24 Am. Rep. 160, 161. A promissory note or bill of exchange is not overdue until the three days of grace have expired: *Goodpastor v. Voris*, 8 Iowa, 334; 74 Am. Dec. 313; *Morrison v. Bailey*, 5 Ohio St. 13; 64 Am. Dec. 632.

NEGOTIABLE INSTRUMENTS—DEFINITION AND OBJECT OF PROTEST: See note to *Dupré v. Richard*, 43 Am. Dec. 216-224, wherein is discussed the question of presentment and demand. As to what should constitute notice of dishonor, see note to *Oromer v. Platt*, 26 Am. Rep. 505-508. As to the service of notice of dishonor of notes and bills, see note to *Ransom v. Mack*, 38 Am. Dec. 607-616.

HORN v. INDIANAPOLIS NATIONAL BANK.

[125 INDIANA, 381.]

NOTICE BY PUBLICATION, WHEN SUFFICIENT.—Notice by publication is sufficient, where the proof shows that three full weeks of publication expired more than thirty days before the first day of the term at which the non-resident defendant was notified to appear.

NUNC PRO TUNC ENTRY OF ORDER FOR PUBLICATION MAY BE MADE WHEN.

—A *nunc pro tunc* entry of the order for publication of notice may be properly made at any time before final judgment is entered.

EQUITABLE TENDER, WHEN NOT REQUIRED IN SUIT TO REDEEM.—While the general rule is that the plaintiff in a suit to redeem real property must make an equitable tender of the amount due the senior lien-holder, if it appears that the lien-holder has money in his hands exceeding the amount of his lien, which he is equitably bound to apply to the discharge of his claim, such tender is not required.

COMPLAINT DOES NOT SHOW CAUSE OF ACTION AGAINST SHERIFF WHO MADE SALE WHEN. — A complaint which seeks to redeem from a sale affirms the sale, and there can therefore be no cause of action against the sheriff who made the sale, even though he did not make a true return.

MORTGAGEE IN POSSESSION CANNOT EMBARRASS RIGHT TO REDEEM BY MAKING IMPROVEMENTS. He may make repairs, but he cannot make improvements, at the expense of redemptioners.

FACTORY AND ITS EQUIPMENTS MAY BE PERSONAL PROPERTY WHEN. — A factory with its equipments, though it is affixed to the soil, may have impressed upon it the character of personal property by the acts and conduct of parties dealing with it as mortgagees and owners, and this character, when once impressed upon it, will be retained, unless by decree it is transformed into real property.

DECREE OF FORECLOSURE WHICH DOES NOT ADJUDICATE UPON CHARACTER OF PROPERTY which is ordered sold to satisfy the mortgage does not estop the senior lien-holder to treat the property as personalty.

REMEDY OF JUNIOR MORTGAGEE WHERE SHERIFF SELLS REALTY AS PERSONALTY. — If a sheriff at a foreclosure sale sells as personal property that which is in fact real property, the remedy of a junior mortgagee is to attack the sale itself as invalid, and not by a suit to redeem.

JUDGMENT CREDITOR CANNOT REDEEM FROM HIS OWN SALE. — A judgment creditor is not entitled, under the statute, to redeem from a sale made to satisfy a judgment entered in his own favor as well as in favor of other lien-holders.

SUIT to redeem. The opinion states the case.

T. J. Kane and T. P. Davis, for the appellants.

L. Wallace, Jr., and R. Graham, for the appellee.

ELLIOTT, J. It is alleged in the complaint of the appellee that in suits brought by Benjamin F. Horn and James R. Carson against Eber Teter and George Teter the appellee recovered judgment for \$5,080, and that a decree was entered foreclosing a mortgage executed by the Teters to the appellee on four acres of land, with its appurtenances; that on the land was a barrel-heading factory, comprising buildings, engines, and machinery. It is also alleged that Horn recovered a judgment for ten thousand dollars, and obtained a decree of foreclosure; that a copy of this decree was issued to the sheriff, who advertised the property for sale; that he sold the property to Horn for two thousand dollars, which was less than one fifth of its value, and that the sheriff subsequently made a return, wherein he stated that Horn purchased the land and buildings without the heading factory or appurtenances, whereas he did in fact purchase the land with its appurtenances. It is further alleged that the appellee gave notice at the time of the sale that it would contest the right of any one to hold the property purchased at the sale as person-

alty; that the Teters are insolvent, and that appellee's judgment can only be collected from the property sold to Horn; that Horn threatens to remove the property from the state, and will remove it unless enjoined; that he has been in possession of the property since 1885, and that the rental value of the property was from two thousand to four thousand dollars per annum; that he has given no credit for rent, and that he has removed from the state, and converted to his own use property of the value of twelve thousand dollars.

Horn entered a special appearance, and moved to quash the notice given him by publication as a non-resident. The contention that the notice was not published for the time required must fail. The proof of publication shows that three full weeks of publication expired more than thirty days before the first day of the term at which he was notified to appear, and this was sufficient, as more than fifty-one days elapsed between the first publication and the first day of the term: *Hill v. Pressley*, 96 Ind. 447.

It was proper to make a *nunc pro tunc* entry of the order for publication. No final judgment had been entered at the time the motion to quash was interposed, so that the case was still pending when the order was entered. The proceedings were therefore *in fieri* at the time the *nunc pro tunc* entry was made, and hence it was clearly within the power of the court to make its record speak the truth. The rule which applies in cases where the action has been fully terminated by a final judgment is not relevant to such a case as this.

The complaint is in the nature of a bill to redeem real property, and the general rule in such cases is, that the plaintiff must make an equitable tender of the amount due the senior lien-holder: *Nesbit v. Hanway*, 87 Ind. 400; *Kemp v. Mitchell*, 86 Ind. 249. But while the general rule is that an equitable tender must be made by offering to pay what may be found due upon an accounting, yet there are exceptions to that rule. One of these exceptions exists where it appears that the lien-holder has money in his hands exceeding the amount of his lien which he is equitably bound to apply to the discharge of his claim: 2 Jones on Mortgages, sec. 1096. The principle which underlies the rule requiring an equitable tender is, "that he who asks equity must do equity." This is the reason for the rule, and where the reason fails, so also does the rule itself. Beyond doubt the reason fails where the senior lien-holder has money in his hands which it is his duty to

apply to the payment of his lien, and which exceeds the amount of his claim. As the complaint in this case shows that the senior lien-holder had money in his hands which it was his duty to apply to the payment of his lien, the case falls, not within the general rule,—for that fails,—but falls within the exception. We must therefore hold that as the allegations of the complaint are confessed by the demurrer, the failure to make an equitable tender is excused by the facts pleaded. In asserting this conclusion we do not inquire whether Horn was chargeable with the rents received by him, for, leaving the amount of the rent out of consideration, it still appears that he had twelve thousand dollars in his hands; hence we need not, and we do not, examine the question of the relevancy of the doctrine declared in the cases of *Gavin v. Graydon*, 41 Ind. 559; *Elwood v. Beymer*, 100 Ind. 504.

We do not at this point decide whether the appellee has any right to redeem, but pass that question, for the reason that it is fully presented in the special finding.

We are unable to discover any theory upon which it can be held that a cause of action is stated against Hawkins. He was, it is true, the sheriff who made the sale; but as the complaint seeks to redeem, it affirms the sale, and as it does this, there can be no cause of action against the officer who made the sale, even if it be conceded that he did not make a true return. It has been again and again decided that a complaint must proceed on a definite theory, and be good on that theory: *Mescall v. Tully*, 91 Ind. 96; *First Nat. Bank v. Root*, 107 Ind. 224; *Louisville etc. Ry Co. v. Thompson*, 107 Ind. 442; 57 Am. Rep. 120; *Rahm v. Deig*, 121 Ind. 283. The only theory upon which this complaint can be good, if, indeed, it can possibly be good on any, is, that it shows a right to redeem from a sale made by a sheriff, and upon that theory it is legally impossible that it can be good against the officer by whom the sale was made. The demurrer filed by Hawkins must be sustained.

The second paragraph of the answer of the appellant Horn is a partial one, and is addressed to so much of the complaint as charges him with the rent of the property of which he was in possession prior to the sheriff's sale. This answer alleges that the appellant made permanent improvements of the value of fifteen hundred dollars, for which he asks credit.

Upon the assumption which we provisionally make, that the complaint was good, the answer was clearly bad. A mort-

gages in possession cannot embarrass the right to redeem by making improvements. He may make repairs, but he cannot make improvements, at the expense of redemptioners: *Müller v. Curry*, 124 Ind. 48.

The special finding states the facts substantially as follows: On the 7th of May, 1886, Eber Teter and George Teter were the owners, as partners, of four acres of land. Situated on this land, and attached to it, were a heading factory and appurtenances. On the day named, a suit was pending in the Hamilton circuit court, wherein James R. Carson and Benjamin F. Horn were plaintiffs, and the Teters, the appellee, and others were defendants, and in that suit a decree of foreclosure was rendered, in which judgments were embodied. Carson recovered \$2,935.80, Horn \$10,889.20, and the appellee \$5,088.63. In June, 1883, and prior to that time, the Teters were partners, doing business under the name of Teter and Brother; their business was that of manufacturing barrel headings, and they were the owners of a factory properly equipped for that business. The land on which the factory was situated was purchased by the firm of Teter and Brother, but the title was taken in the name of George Teter, trustee. On the twenty-ninth day of June, 1883, Teter and Brother executed a chattel mortgage to James R. Carson on the partnership property, in which the property was designated "as the following personal property: One slack-barrel heading factory, consisting of boiler, engine, two planers, two jointers, two heading-turners, four saw rigs, two thousand feet of inch gas-pipes and connections, and all other property or incidents connected therewith, including pulleys, belts, tanks, etc., now located on part of lot numbered 2 of Coles and Jones's addition to the town of Cicero, Hamilton County, Indiana." This chattel mortgage was executed to secure and indemnify the mortgagees against loss as surety upon a promissory note executed by Teter and Brother for five thousand dollars, and it was provided in the mortgage that the mortgagors might remove the heading factory to the four acres of ground situated in the town of Sheridan. This mortgage was duly recorded. During the latter part of the summer of 1883, the factory and appurtenances were removed to Sheridan and attached to the four-acre tract of land. Before the removal of the factory to Sheridan, Teter and Brother became indebted to Horn in the sum of five thousand dollars, and to secure this indebtedness, and also to secure advances that might sub-

sequently be made by Horn, the firm of Teter and Brother, and the trustee, George Teter, executed to him, on the twenty-fourth day of October, 1883, a mortgage on the property in Sheridan. This mortgage, after describing the land, recited that, "And this sale includes all machinery, pipes, and appurtenances connected therewith on said real estate." It was also declared in the mortgage that it was subject to the mortgage of James R. Carson. The mortgage to Horn was recorded on the twenty-fifth day of October, 1883.

On the twentieth day of November, 1883, Teter and Brother and their trustee executed a conveyance to Carson, in terms, granting all the property to him, but which, by agreement, was in fact a mortgage to secure his claim. On the seventeenth day of August, 1884, Teter and Brother were indebted to Horn in the sum of \$9,720.58, to Carson in the sum of \$2,500, and to Smith and Rodeman in the sum of \$1,200. On that day these parties agreed that Horn should have a first lien for his claim on the land, that the lien of Carson and Horn should be of the same rank upon the factory and appurtenances, and that Horn and Smith and Rodeman should take possession and operate the factory, that they should pay the expense of the business, and out of the net earnings pay one half to Horn, one fourth to Carson, and the remaining one fourth to Smith and Rodeman. This agreement was recorded on the eighteenth day of August, 1884. On the twenty-eighth day of November, 1884, Teter and Brother executed to the appellee a mortgage on the property in Sheridan to secure an indebtedness of four thousand nine hundred dollars, and this mortgage was seasonably recorded. On that day the appellee entered into an agreement with the other interested parties similar to that entered into between the mortgagors and their creditors on the 17th of August, in so far as concerned the operation of the factory and the division of profits, but stipulating that Smith and Rodeman should operate the mill and conduct the business. The factory was operated by Smith and Rodeman until October, 1885, but no profits were realized. In that month Horn, with the consent of the interested parties other than the appellee, took possession of the property. The use of the property during the time Horn held possession was of the value of one thousand dollars. In May, 1886, a decree was rendered upon the several mortgages and agreements in a suit wherein the mortgagors and all of the mortgagees were parties. The mortgages and agreements

"were," as the special finding expresses it, "adjusted and merged in said judgment and decree, save and except the question of the use and possession, and the question of repairs made by Horn after October 20th, 1885," which matters were left by the court for future consideration. The decree states the amount which each of the lien-holders was entitled to recover, and adjudges a recovery. It also fixes the order of priority, directs a sale, and provides the method of distributing the avails of the sale. The clerk issued a certified copy of the decree to the sheriff; he advertised the property for sale, describing in the notice the land by metes and bounds, and adding to such description the following: "Including the heading factory and all appurtenances connected therewith; also the buildings thereon situate, together with all machinery, located at Sheridan, Indiana, formerly known as the Teters's Heading Factory." The appellee gave notice to Horn and to the sheriff that the property should not be sold separately, and directed that it should all be sold as real estate. On the third day of July, 1886, the sale was made. In making the sale the sheriff sold the land separately to Horn, who bid for it two thousand dollars, and the heading factory and equipments he also sold to Horn for the sum of four thousand dollars, that being the amount bid by him. Horn has removed part of the machinery from the state, and the part so removed is of the value of nine thousand dollars. The Teters are insolvent, and unless the appellee can make its claim out of the property it will be lost. The court stated as conclusions of law,—"1. That the law is with the plaintiff; 2. That the plaintiff ought to have judgment against Benjamin F. Horn and Elihu Hawkins for one half of the value of the property."

It cannot be successfully denied that the factory and its equipments were treated by all the interested parties as personal property long prior to the time the appellee's mortgage was executed. It was so characterized in the chattel mortgage to Carson, in which the right to remove it from the town of Cicero to Sheridan was provided for, and so it was treated in the agreements made between the parties prior in equity and in time to the appellee. The agreement between the appellee and the senior lien-holders recognizes the validity of the former agreements and mortgages, so that the parties by their own acts had impressed upon the factory and its equipments the character of personal property: *Ford v. Cobb*, 20 N. Y. 844. It was entirely competent for them to do this,

for a factory and its equipments, or a mill and its machinery, may be personal property although it is affixed to the soil: *Malott v. Price*, 109 Ind. 22; *Rogers v. Cox*, 96 Ind. 157; 49 Am. Rep. 152; and cases cited. Whether property is real or personal is, as the modern decisions unite in declaring, in a great measure a question of intention: *Hubbell v. East Cambridge etc. Savings Bank Co.*, 182 Mass. 447; 42 Am. Rep. 446, and the authorities in the note to page 447. In this instance the intention to fix upon the heading factory and its equipments the character of personalty had been fully and unequivocally manifested, and notice lawfully given before the appellee acquired any rights in the property. We are not therefore dealing with a case where a purchase is made, or a mortgage accepted, where there is no notice of the character of the property, and appearances indicate that it is part of the realty. We make no inquiry as to what rights a mortgagee acquires where his lien is taken upon the faith that the property is land, and there is neither actual nor constructive notice that the parties have by their conduct impressed upon the property a different character.

As the factory and its equipments were originally personal property, that character they retained, unless it be true that the decree in the foreclosure suit transformed it into property of another kind. The case is, so far as concerns this point, controlled by the decree. If the decree does, as appellee's counsel contend, adjudge that the property is real and not personal, the appellants are estopped to treat it as personalty. There is no direct adjudication upon this question, for there is no express decretal order that the mill and its equipments are either real or personal property, nor does it appear that the pleadings directly presented that question for decision. So far as we can judge from the special findings, the parties simply sued to foreclose their respective liens, and the only questions which necessarily arise on pleadings demanding a foreclosure are as to the right to a foreclosure, the priority of equities, and the distribution of the proceeds. It would no doubt have been within the power of the court to adjudicate upon the question of the character of the property as an incident of the suit, had that question been directly made; but the question was not directly made, and there is no express adjudication. We must therefore ascertain whether there is such an inferential or indirect decision of the question of the character of the property as concludes the parties. The ap-

pellee's counsel assert that the material part of the decree is this: "It is therefore considered, ordered, and adjudged by the court that the plaintiff Benjamin F. Horn recover the sum of \$10,889, and that the plaintiff James R. Carson recover the sum of \$2,935.80, and also that there is due said Smith and Rodeman \$1,320, and that said Indianapolis National Bank recover the sum of \$5,088.13. It is further adjudged and decreed by the said court that said mortgage set out in the complaint in favor of said plaintiffs, and also the mortgage in the cross-complaint in favor of said bank, should be foreclosed, and that the equity of redemption of said defendants, and each of them, in and to said property, and all other persons claiming through and under them, or either of them, in and to said property be and the same is hereby barred and forever foreclosed. And it is further ordered and adjudged by said court that said property, or so much thereof as may be necessary for that purpose, shall be sold by the sheriff of said county of Hamilton as other property is sold on execution issued upon judgment at law, after duly advertising the same."

This decretal order does not direct that the property shall be sold as land or real property, but it simply directs that it shall be sold as property, so that it cannot be inferred from the description of the thing directed to be sold whether it is that species of property within the class denominated chattels, or within the class denominated lands, for the generic term employed includes both species. The order does, it is true, bar the equities of the parties, but such an order would be appropriate if only personal property were involved; here, however, both classes of property were involved, for at the time the decree was entered the factory and machinery were undoubtedly personal property. For this reason it cannot be justly said that the provision barring the equity of redemption is conclusive as to the character of the property ordered to be sold. We cannot hold that there is such an adjudication as concludes the parties from showing the truth, for the general rule is, that decrees relied upon as creating an estoppel are to be construed with strictness; and certainly this general rule should apply here, for the equities are strongly with the senior lien-holder, and prior to the decree the factory and its equipments were certainly treated as personal property. It ought, in good conscience, to apply, because a sworn officer gave a construction to the decree and insisted upon

selling the factory and equipments as personal property, and the senior mortgagee could not do otherwise than buy at the sale without suffering delay, and probably serious loss. If the appellee was not satisfied with the construction of the decree given by the sheriff, it ought to have applied to the court for relief, and not have delayed until the senior lien-holder had purchased and taken possession of the property.

It is difficult to perceive how it can be possible for the appellee to affirm the sale by offering to redeem, and yet insist upon its invalidity; but this the appellee does by insisting that the property sold as personal property is in fact real estate. If it be true that the factory and equipments were real estate, then the sheriff did wrong in selling them as personal property, and the sale might have been avoided; but this is not what the appellee seeks to do, for it asserts that the sale is valid by offering to redeem. In affirming the validity of the sale it made an election, and made one that necessarily affirms the sale; and thus affirming the validity of the sale, the appellee cannot be heard to aver that Horn did not buy the mill and its equipments as personal property. He could not, indeed, have bought them as anything else, for they were advertised and sold as personal property. If they are personal property there can, of course, be no redemption. If the sale was invalid, the appellee's remedy was by an attack upon the sale itself, and not by a suit to redeem: *Jones v. Kokomo, etc. Ass'n*, 77 Ind. 340.

The appellee's equity of redemption was barred by the decree, and the only claim it can with plausibility assert is, that it has a right to redeem under the statute. The only right it has to redeem, if it has any at all, is under the statute, for its general equity of redemption is cut off by the decree: *Eiceman v. Finch*, 79 Ind. 511; *Duke v. Beeson*, 79 Ind. 24. If the appellee has a right to redeem under the statute now in force, it must be for the reason that it belongs to the class of persons to whom the statute grants the privilege of redeeming, for the right is purely a statutory one, and can only be exercised by the persons upon whom the statute confers it. The law as it now stands is clearly laid down in the well-reasoned case of *Hervey v. Krost*, 116 Ind. 268. The rule there declared is, that a judgment creditor cannot redeem from his own sale. It is there shown that the decision in *Greene v. Doane*, 57 Ind. 186, was of doubtful soundness under former statutes, and that it is entirely with-

out force under the present ones. We must therefore accept as the settled law of this state the rule that a judgment creditor cannot redeem from his own sale.

If the sale from which the appellee seeks to redeem was made to satisfy its judgment, it has no statutory right to redeem, so that the pivotal question is, whether the sale was made on its own judgment. It will aid us in our investigation to ascertain the reason for the rule prohibiting a judgment creditor from redeeming from a sale made to satisfy a judgment in his own favor. The policy of the law is to make the property bring its full value, and to discourage persons from bidding less than the fair value of the property. It is also the intention of the law to do justice to interested parties, by securing the fair value of the property at one sale, and thus prevent the annoyance and expense of numerous sales; and numerous sales may follow where there are many successive redemptions. The law was not intended to enable a creditor to offer only part of the fair value of the property, and take the chance of a redemption; neither was it intended that the creditor should permit others to bid much less than the value of the property, and subsequently redeem from the sale. Nor was it intended that bidders should be discouraged by the uncertainty of acquiring title, and the probability that the owner of the judgment which the property was sold to satisfy might come in and redeem. These are strong reasons supporting the conclusion that a judgment creditor should not be permitted to redeem from a sale made to satisfy his own judgment, and the conclusion is supported by authority. In *Hervey v. Krost*, 116 Ind. 268, it was said: "While the courts favor and give a liberal construction to redemption laws in the interest of the debtor and others who are concerned that the debtor's property shall go towards the payment of his debts to the full extent of its value, and to whom the right of redemption may be their only means of protection, it never could have been intended that redemption should afford a rapacious creditor the means of speculating out of the property and upon the necessities of his debtor." The conclusion is supported by the long line of cases which hold that where a sale is made to satisfy two judgments, there can be no redemption, although both may not be satisfied: *Simpson v. Castle*, 52 Cal. 644; *Black v. Gerichten*, 58 Cal. 56; *People v. Easton*, 2 Wend. 298; *Ex parte Lawrence*, 4 Cow. 417; 15 Am. Dec. 386; *Jackson v. Bowen*, 7

Cow. 13; *People v. Fleming*, 2 N. Y. 484; *Russell v. Allen*, 10 Paige, 249; *Clayton v. Ellis*, 50 Iowa, 590.

The appellee is clearly within the reason of the rule, and it is within the letter, for the judgment was entered in its favor as well as in favor of the other lien-holders. There was one decree, and it was the decree of all the lien-holders. The decree authorized one sale, and it was the sale of all the judgment creditors. If the property had sold for enough to satisfy the judgment of the appellee, in whole or in part, it could not be doubted that the sale was on its own judgment; and the fact that it did not sell for enough to satisfy its judgment does not change the principle which governs the case. The decree directed the property to be sold to pay all of the liens, and made provision for distribution to the appellee, and all other lien-holders, so that there could only be one sale.

Analogous cases in our reports prove that there was but one judgment and one sale. In *Harrison v. Stipp*, 8 Blackf. 455, it was held that where the sheriff had several executions in his hands, and the property was not susceptible of division, there must be but one sale, and this case has often been followed and approved. The decision in the case of *Steamboat Rover v. Stiles*, 5 Blackf. 483, is, that where liens are filed against a steamboat, there can be only one judgment and one sale. It is true that the decision referred to is modified in some respects by the case of *Rose v. McDonald*, 23 Ind. 157, but it is not modified upon the point to which it is here cited.

In the case of *Shirk v. Wilson*, 13 Ind. 129, it was held that where several claims are filed in attachment proceedings there can be only one sale, although some of the judgments were collectible without relief from appraisement laws, and others were subject to these laws. *Davis v. Langedale*, 41 Ind. 399, is not in conflict with the cases to which we have referred, for in that case the peculiar provisions of the decree prevented a sale on the junior mortgagee's claim until after the claim of the senior mortgagee should be satisfied: *Langedale v. Mills*, 32 Ind. 380. Decisions of other courts come nearer the precise case before us, and are indeed decisive of the principle which rules the case. In the case of *McCullough v. Rose*, 4 Brad. (App.) 149, it was held that where there was an interpleader filed in a suit to foreclose a mechanic's lien, the decree was the decree of all, and that none of the parties to it, in the character of creditors, could redeem from the sale. The case of *Todd v. Davey*, 60 Iowa, 532, declares that a

mortgagee cannot redeem from a sale made upon a decree in his favor, and cites the cases of *Clayton v. Ellis*, 50 Iowa, 590; *Blake v. Black*, 55 Iowa, 252; *Poweshiek County v. Dennison*, 36 Iowa, 244; 14 Am. Rep. 521; and *Escher v. Simmons*, 54 Iowa, 269.

The opinion in the case of *Lauriat v. Stratton*, 6 Saw. 339, is a strong one, and it is declared that a sale upon a decree foreclosing several mortgages is a sale as to all the lienholders, and that there can be no redemption by any one of them. The court said: "It cannot be denied, and is admitted, that if the sale was made in pursuance of a decree in favor of Crooke as mortgagee, and upon process to enforce such decree as to his lien as well as that of Swegle, his lien was thereby extinguished." The court cites, in support of its conclusion, the cases of *Shepard v. O'Neil*, 4 Barb. 125; *Wood v. Colvin*, 5 Hill, 228; *Ex parte Stevens*, 4 Cow. 133. It is true that in *Lauriat v. Stratton*, 6 Saw. 339, reference is made to the statute of Oregon, and it is said that the statute requires the court to adjudicate upon the rights of all the parties to a foreclosure; but this does not weaken the force of the decision as applied to cases under our statute; on the contrary, it strengthens it, for it has long been the rule in this state that all rights and equities must be settled in one decree, and that this is one of the leading purposes of our statute: *Woodworth v. Zimmerman*, 92 Ind. 349, and cases cited; *Masters v. Templeton*, 92 Ind. 447; *Stockwell v. State*, 101 Ind. 1; *Bundy v. Cunningham*, 107 Ind. 360; *Adair v. Mergentheim*, 114 Ind. 303. As the law contemplates a final decree adjusting all rights and equities, and as such a decree was rendered in the foreclosure suit involved in this case, it necessarily results that a sale upon that decree was a sale on all the judgments embodied in it. This being true, it must also be true that none of the claimants in whose favor a judgment was incorporated in the decree of the court can redeem from the sale made on the decree.

The judgment is reversed, with instructions to restate conclusions of law, and render judgment upon the special findings in favor of the appellant Horn, and with the further instruction to sustain the demurrer of appellant Hawkins to the complaint.

WHO MAY REDEEM FROM EXECUTION OR FORECLOSURE SALE.—The right to redeem lands sold under execution is a purely statutory right, and is regulated by the statutes that give it. In delivering the opinion of the court

in *Living v. Cook*, 85 Tenn. 332, 4 Am. St. Rep. 765, Lurton, J., said: "The right of a judgment debtor to redeem his lands sold under execution is not an equitable right at all. It is the creature of statute, and depends on statute law, and in no sense a right either created or regulated by principles of equity. The right of redemption given by statute, both to the judgment debtor and judgment creditors, is a legal and not an equitable right. Strictly speaking, there is no estate in the judgment debtor after sale and conveyance of his land under judgment sale. Nothing remains to the debtor, after execution sale and sheriff's deed, save a statutory right of redemption. This right of redemption has sometimes been spoken of as an equitable right, and his interest in the land subject to redemption as an equitable estate. This terminology springs from the supposed analogy between the statutory right of redemption and the equity of redemption of a mortgagor. But whatever may be the technical character of the interest springing from the right of redemption given to a judgment debtor whose lands have been sold under execution, it is not one which may be reached and subjected to sale by a creditor who is in condition to redeem as provided by statute." The statutes of the different states which provide who may redeem property sold under execution differ more or less from one another, but they generally confer the right to redeem upon three classes of persons: 1. The defendant in execution, and his successors in interest; 2. Creditors having liens by judgment; 3. Creditors having liens by mortgage; 2 Freeman on Executions, 2d ed., sec. 317.

A defendant in execution may, in most of the states, redeem from an execution sale, notwithstanding the fact that he has conveyed to another the property sold under execution: *Yoakum v. Bower*, 51 Cal. 539; *Livingston v. Arnoux*, 56 N. Y. 507; *Jones v. Planters' Bank*, 5 Humph. 619; 42 Am. Dec. 471; *Harvey v. Spaulding*, 16 Iowa, 397; 85 Am. Dec. 526. In the case of *Yoakum v. Bower*, 51 Cal. 540, the court said: "There is no good reason why the statute, which is remedial in its character, should receive a narrow construction, in order to defeat the right of redemption which it intended to give. It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale; and a variety of other cases might readily be imagined in which the judgment debtor, even though he had sold the property, would still have an interest in effecting a redemption from the execution sale." And the defendant may redeem even after he has been compelled to transfer all his assets to a receiver: 2 Freeman on Executions, sec. 317; *Bleworth v. Muldoon*, 46 How. Pr. 246; *Livingston v. Arnoux*, 56 N. Y. 507. A judgment debtor whose lands have been sold under execution may redeem them from the purchaser without paying the amount of a prior judgment against him held by a partnership of which the purchaser is a member: *Campbell v. Oaks*, 68 Cal. 222. But if the execution debtor, through his culpable negligence or ignorance of law, fails to redeem within the time limited by statute, he is not entitled to any relief in equity: *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475; *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133.

Any person to whom the judgment debtor conveys or assigns the property has the same right to redeem that the debtor himself has: *Stoddard v. Forbes*, 13 Iowa, 296; *Harvey v. Spaulding*, 16 Iowa, 397; 85 Am. Dec. 526; *Thayer v. Coldren*, 57 Iowa, 110; *Watson v. Hannum*, 10 Smedes & M. 521; *Jones v. Planters' Bank*, 5 Humph. 619; 42 Am. Dec. 471. But the assignment by the execution defendant of his right to redeem confers upon the assignee no higher right than the assignor himself possessed, and a redemption by such

assignee leaves the property subject to be taken in satisfaction of any subsisting lien thereon, to the same extent that it might be taken if in the hands of the execution defendant: *Stein v. Chambliss*, 18 Iowa, 474; 87 Am. Dec. 411; *Curtis v. Millard*, 14 Iowa, 123; 81 Am. Dec. 460. The trustees of an absent debtor may redeem from an execution sale against him; but a stranger is not entitled to redeem: *Phyfe v. Riley*, 15 Wend. 243; 30 Am. Dec. 55. General creditors who have not reduced their claims to judgment and who have no lien on the property are not entitled to redeem from an execution sale: 2 Freeman on Executions, sec. 317; *Thomason v. Scales*, 12 Ala. 309; *Woods v. McGasock*, 10 Yerg. 133; *Hopkins v. Webb*, 9 Humph. 519.

The owner of a judgment, whether he is the plaintiff in whose favor it was rendered or his assignee, has the right to redeem: *Couthway v. Berghma*, 25 Ala. 393; *Swezey v. Chandler*, 11 Ill. 445; *Martin v. Judd*, 60 Ill. 78; *Arnold v. Gifford*, 62 Ill. 250; *Seavers v. Wood*, 12 Iowa, 295; *Van Rensselaer v. Sheriff*, 1 Cow. 443; *Snyder v. Warren*, 2 Cow. 518; 14 Am. Dec. 519; *Ex parte Newell*, 4 Hill, 608; *Ex parte Raymond*, 1 Denio, 272; *Beckman v. Bunn*, Hill & D. 265; *Aylesworth v. Brown*, 10 Barb. 167. A judgment creditor cannot redeem from his own sale: 2 Freeman on Executions, sec. 317; *Clayton v. Ellis*, 50 Iowa, 590; *Hayden v. Smith*, 58 Iowa, 285; *Ex parte Paddock*, 4 Hill, 544; *Ex parte Stevens*, 4 Cow. 133; *Russell v. Allen*, 10 Paige, 249; *People v. Easton*, 2 Wend. 297. And this rule is applied where the plaintiffs and others obtain a decree subjecting certain property to the payment of their judgments in the order of their priority, and one execution issues in the name of all, and the execution sale is for the benefit of all, but the proceeds are exhausted in paying prior judgments: *Hayden v. Smith*, 58 Iowa, 285. A judgment creditor may redeem notwithstanding he may have other adequate securities for the protection of his debt: *Fletcher v. Holmes*, 25 Ind. 458; *Muir v. Leitch*, 7 Barb. 341.

WHO MAY REDEEM FROM FORECLOSURE SALE. — Generally speaking, any party who has an interest in the property sold under foreclosure proceedings may redeem from the sale. But to sustain a bill to redeem, the plaintiff must have the mortgagor's title, or some subsisting interest under it: 2 Jones on Mortgages, sec. 1055; *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Butts v. Broughton*, 72 Ala. 294; *Powers v. Golden Lumber Co.*, 43 Mich. 468; *Boarman v. Catlett*, 13 Smedes & M. 149; *Grant v. Duane*, 9 Johns. 59; *Chamberlin v. Chamberlin*, 44 N. Y. Sup. Ct. 116; *Lomax v. Bird*, 1 Vern. 182. He need not, however, be interested in the whole of the premises sold, nor is it necessary that he should have a title in fee in the premises, in order to entitle him to redeem. If he is in privity in title with the mortgagor, and has such an interest that he would be a loser by the foreclosure, he may redeem: *Pearce v. Morris*, L. R. 5 Ch. App. Cas. 227; *Scott v. Henry*, 13 Ark. 112; *Platt v. Squire*, 12 Met. 494; *Farnham v. Metcalf*, 8 Cush. 46; *Smith v. Austin*, 9 Mich. 465; *Boarman v. Catlett*, 21 Miss. 149; *Brewer v. Hyndman*, 18 N. H. 9; *Moore v. Beason*, 44 N. H. 215; *Boquet v. Coburn*, 27 Barb. 230; *In re Willard*, 5 Wend. 94; *Purnis v. Brown*, 4 Ired. Eq. 413; *Selwood v. Gray*, 11 Or. 534. In delivering the opinion of the court in *Smith v. Austin*, 9 Mich. 474, Christiancy, J., said: "But the interest required as the basis of a right to redeem need not be the fee subject to the mortgage, or the whole of the mortgagor's original equity of redemption (except in some cases of a statute redemption thus limited). Any person who may have acquired any interest in the premises, legal or equitable, by operation of law or otherwise, in privity of title with the mortgagor, may redeem, and protect such interest in the land: Story's Eq. Jur., sec. 1023. But it must be an interest

in the land, and it must be derived in some way, mediate or immediate, from, or through, or in the right of the mortgagor, so as, in effect, to constitute a part of the mortgagor's original equity of redemption. Otherwise it cannot be affected by the mortgage, and needs no redemption." But the right to redeem exists only in favor of one who has such an interest that the right to redeem is necessary to its protection: *Buser v. Shepard*, 107 Ind. 417. In general, only the mortgagor and those holding the legal title under him can redeem; an equitable title does not give the right, and therefore the holder of a bond for a deed from the mortgagor cannot maintain a bill to redeem: *McDougald v. Capron*, 7 Gray, 278; *Grant v. Duane*, 9 Johns. 591; *Lomax v. Bird*, 1 Vern. 182; *Fray v. Drew*, 11 Jur., N. S., 130. A mortgagor who has by a warranty deed conveyed the equity of redemption to a third person cannot maintain a bill to redeem: 2 Jones on Mortgages, sec. 1056; *True v. Haley*, 24 Me. 297; *Elder v. True*, 32 Me. 104; *Phillips v. Leavitt*, 54 Me. 405.

An equity of redemption cannot be sold on execution to satisfy the debt secured by the mortgage, and if such a sale be made, the mortgagor will still have the power to redeem, just as if no such sale had been made: 2 Jones on Mortgages, sec. 1056; *Atkins v. Sawyer*, 1 Pick. 351; 11 Am. Dec. 188, note 193-198; *Washburn v. Goodwin*, 17 Pick. 137.

If a second mortgagee forecloses a mortgagor's equity of redemption, the mortgagor cannot redeem from the first mortgage, for his title is wholly extinguished, and vested in the second mortgagee, who alone has the right to redeem from the first mortgage: 2 Jones on Mortgages, sec. 1057; *Colwell v. Warner*, 36 Conn. 224. But if the first mortgagee forecloses the mortgage without making the second mortgagee a party to the suit, the second mortgagee may redeem from the first mortgage, and the mortgagor may, by redeeming from the second mortgage, acquire the right of the second mortgagee to redeem from the first: *Goodman v. White*, 26 Conn. 317.

The right of a mortgagor to redeem is not affected by the fact that he may have had no title to the mortgaged property: *Lorenzana v. Camarillo*, 45 Cal. 125. A mortgagor has a right to redeem, where the mortgagee becomes the purchaser under a sale by virtue of a power contained in the mortgage: *Benham v. Rowe*, 2 Cal. 387; 56 Am. Dec. 342. But the whole amount due upon the mortgage must be paid before the mortgaged property can be redeemed by a mortgagor who is tenant in common with the mortgagee of the mortgaged premises: *Merritt v. Hosmer*, 11 Gray, 276; 71 Am. Dec. 713. In Massachusetts, where a mortgage of lands contains a power of sale, the mortgagor may, after a breach of the condition of the mortgage, and before a sale of the premises conveyed by it has actually taken place, without a previous tender, bring a bill in equity to redeem, on offering in the bill to pay the amount due: *Way v. Mullett*, 143 Mass. 49.

The grantee of the equity of redemption has the same right to redeem as the mortgagor himself had: *Bradley v. Snyder*, 14 Ill. 263; 58 Am. Dec. 564; *Stockell v. Taylor*, 3 Md. Ch. 537; *Frische v. Kramer's Lessee*, 16 Ohio, 125; 47 Am. Dec. 368. And where, upon a foreclosure of a mortgage, the mortgagee purchases the land for a sum less than the amount of the judgment, and docket a judgment for the deficiency, the purchaser from the mortgagor of the land, pending the time for redemption, is entitled as successor in interest to redeem from the mortgagee, without paying the amount of the deficiency: *Simpson v. Cattle*, 52 Cal. 644. And the purchaser of the equity of redemption sold under execution has the right to redeem: *Watson v. Steele*, 78 Ala. 361; *Julian v. Bell*, 26 Ind. 220; 89 Am. Dec. 460; *Coombs v. Carr*, 65 Ind. 303; *Wellington v. Gale*, 13 Mass. 483; *Atkins v. Sawyer*, 1 Pick. 351;

11 Am. Dec. 188; *Raymond v. Holborn*, 23 Wis. 57; 99 Am. Dec. 105; 2 Jones on Mortgages, sec. 1069.

So, also, is an assignee of the equity of redemption entitled to redeem: *Thorne v. Thorne*, 1 Vern. 182; *Scott v. Henry*, 13 Ark. 112; *Barnard v. Cushman*, 35 Ill. 451; *Rogers v. Meyers*, 68 Ill. 92; *Banks v. McClellan*, 24 Md. 62; 87 Am. Dec. 594; *White v. Bond*, 16 Mass. 400; *Hepburn v. Kerr*, 9 Humph. 726; 51 Am. Dec. 686; *Lloyd v. Hoo Sue*, 5 Saw. 74. Where a mortgagee assigns his mortgage as security for the payment of a debt due from him to the assignee, the assignment is in effect a mortgage of the mortgage; and if the assignee forecloses the mortgage and buys in the mortgaged premises, the assignor is entitled to redeem from him: *Slee v. Manhattan Co.*, 1 Paige, 48; *Hoyt v. Martense*, 16 N. Y. 231; *Winterbottom v. Tayloe*, 2 Drew. 279. So, too, an attaching creditor has the right to redeem: *Town of Bridgeport v. Blinn*, 43 Conn. 274; *Briggs v. Davis*, 108 Mass. 322; *Chandler v. Dyer*, 37 Vt. 345.

A judgment creditor of the mortgagor has the right to redeem without having had an execution issued or the land sold. But a general creditor whose claim has not been reduced to judgment and made a lien on the mortgaged premises cannot redeem: *Mildred v. Austin*, L. R. 8 Eq. Cas. 220; *Connecticut M. L. I. Co. v. Crawford*, 21 Fed. Rep. 281; *Cramer v. Watson*, 73 Ala. 127; *Seals v. Pfeiffer*, 77 Ala. 278; *Fitch v. Wetherbee*, 110 Ill. 475; *Hitt v. Holliday*, 2 Litt. 332; *White v. Bond*, 16 Mass. 400; *Mallalieu v. Wickham*, 42 N. J. Eq. 297; *Benedict v. Gilman*, 4 Paige, 58; *Van Buren v. Olmstead*, 5 Paige, 9; *Dauchy v. Bennett*, 7 How. Pr. 375; *Bank of Niagara v. Rosewilt*, 9 Cow. 409; *Brainard v. Cooper*, 10 N. Y. 356; *Stainback v. Geddy*, 1 Dev. & B. Eq. 479; 2 Jones on Mortgages, sec. 1069.

A junior mortgagee has the right to redeem from a sale made under a senior mortgage: *Wiley v. Ewing*, 47 Ala. 418; *Scott v. Henry*, 13 Ark. 112; *Frink v. Murphy*, 21 Cal. 108; 81 Am. Dec. 149; *Morse v. Smith*, 83 Ill. 396; *Rogers v. Hermon*, 92 Ill. 583; *Hervey v. Krost*, 116 Ind. 268; *Gaskell v. Viquesney*, 122 Ind. 244; 17 Am. St. Rep. 364; *Crossen v. White*, 19 Iowa, 109; 87 Am. Dec. 420; *Manning v. Markel*, 19 Iowa, 103; *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514; *Gower v. Winchester*, 33 Iowa, 303; *American Buttonhole etc. Co. v. Burlington L. L. Ass'n*, 61 Iowa, 464; *Bunce v. West*, 62 Iowa, 80; *Spurgin v. Adamson*, 62 Iowa, 661; *Dickerman v. Lust*, 66 Iowa, 444; *Bigelow v. Willson*, 1 Pick. 436; *Kimmell v. Willard*, 1 Doug. (Mich.) 217; *Sager v. Tipper*, 35 Mich. 134; *Lamb v. Jeffrey*, 41 Mich. 719; *Hill v. White*, 1 N. J. Eq. 435; *Haines v. Beach*, 3 Johns. Oh. 459; *Parlee v. Van Auken*, 3 Barb. 534; *Jenkins v. Continental Ins. Co.*, 12 How. Pr. 66; *Ellsworth v. Lockwood*, 42 N. Y. 69; *Frost v. Yonkers S. Bank*, 70 N. Y. 553; 26 Am. Rep. 627; 2 Jones on Mortgages, sec. 1064.

A grantor by an absolute deed which is in fact a mortgage has the same right to redeem as a mortgagor in a formal mortgage would have, so long as the grantee retains the property: 2 Jones on Mortgages, sec. 1060; *Eiseman v. Gallagher*, 24 Neb. 79; *Vanderhaise v. Hugues*, 13 N. J. Eq. 410; *Whitlick v. Kane*, 1 Paige, 202; *Meehan v. Forrester*, 52 N. Y. 277; *Ballard v. Jones*, 6 Humph. 456; *Still v. Buzzell*, 60 Vt. 478. But a purchaser at an execution sale, seeking to redeem from a trust deed which is a prior lien, cannot ask for relief from a penalty provided by such trust deed: *Blair v. Chamberlin*, 39 Ill. 521; 89 Am. Dec. 322. A conveyance by a debtor, in trust, to secure his debt is to be considered as a mortgage from which he has a right to redeem: *Chowning v. Cox*, 1 Rand. 306; 10 Am. Dec. 530; *Pennington v. Hanby*, 4 Munf. 140. If a grantee in a deed absolute in form, but really a mortgage, conveys to a *bona fide* purchaser, he must make good the loss to the grantor by reason

of his loss of his right to redeem his land; *Meehan v. Forrester*, 52 N. Y. 277; *Whittick v. Kane*, 1 Paige, 202.

A tenant in common or owner of an undivided interest in an equity of redemption may redeem, but in doing so he must pay the whole amount of the mortgage debt: 2 Jones on Mortgages, sec. 1063; *Howard v. Harris*, 1 Vern. 33; *Pearce v. Morris*, L. R. 5 Ch. App. Cas. 227; *Eldridge v. Wright*, 55 Cal. 531; *Seymour v. Davis*, 35 Conn. 264; *Lyon v. Robbins*, 45 Conn. 513; *Eice-man v. Finch*, 79 Ind. 511; *Smith v. Kelley*, 27 Me. 237; 46 Am. Dec. 595; *Wood v. Goodwin*, 49 Me. 260; 77 Am. Dec. 259; *Taylor v. Porter*, 7 Mass. 355; *Gibson v. Crehore*, 5 Pick. 148; *Merritt v. Hosmer*, 11 Gray, 276; 71 Am. Dec. 713; *Ex parte Willard*, 5 Wend. 94; *Boquet v. Coburn*, 27 Barb. 230; *Hubbard v. Accutney M. D. Co.*, 20 Vt. 402; 50 Am. Dec. 41; *McLaughlin v. Curtis*, 27 Wis. 644.

The heirs or devisees of a deceased mortgagor are entitled to redeem: 2 Jones on Mortgages, sec. 1062; *Pym v. Boureman*, 3 Swanst. 241; *Lewis v. Nangle*, 2 Ves. Sr. 431; *Butts v. Broughton*, 72 Ala. 294; *Hunter v. Dennis*, 112 Ill. 568; *Zaegel v. Kuster*, 61 Wis. 31; *Chew v. Hymas*, 10 Biss. 240.

A tenant for life, a tenant in tail, or a remainderman may redeem: 2 Jones on Mortgages, sec. 1065; *Wicks v. Scrivens*, 1 Johns. & H. 215; *Evans v. Jones*, Kay, 29; *Davis v. Wetherell*, 13 Allen, 60; 90 Am. Dec. 177; *Lamson v. Drake*, 105 Mass. 564.

A tenant for years may also redeem: 2 Jones on Mortgages, sec. 1066; *Keck v. Hall*, 1 Doug. 21; *Bacon v. Bowdoin*, 22 Pick. 401; *Davis v. Wetherell*, 13 Allen, 60; 90 Am. Dec. 177; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Averill v. Taylor*, 8 N. Y. 44. *Morse, J.*, in delivering the opinion of the court in *Averill v. Taylor*, 8 N. Y. 51, said: "The important point of inquiry in this case is, whether a tenant for years has a right to redeem the mortgage of his lessor, made before the lease under which the tenant claims. I understand the law to be as well settled as the reason and justice of the rule is clear, that any one who holds the actual relation of surety for the mortgage debt, charged upon land in which he has an interest, although his liability as such surety extends no further than to lose his interest in the land, has a right to redeem, for the protection of such interest."

A widow who has joined in the mortgage in release of her dower may redeem: 2 Jones on Mortgages, sec. 1067; *Butts v. Broughton*, 72 Ala. 294; *Davis v. Wetherell*, 13 Allen, 60; 90 Am. Dec. 177; *Lamb v. Montague*, 112 Mass. 352; *Opdyke v. Bartles*, 11 N. J. Eq. 133; *McArthur v. Franklin*, 16 Ohio St. 193; *Trenholm v. Wilson*, 13 S. C. 174; *Gatewood v. Gatewood*, 75 Va. 407; *Posten v. Miller*, 60 Wis. 494.

And where a mortgage given by a man and his wife is foreclosed, and she is not made a party, or is not served with process, she may, after a sale of the mortgaged premises, and during the lifetime of her husband, maintain, because of her inchoate right of dower, an action to redeem the mortgaged premises from the sale: *Taggart v. Rogers*, 49 Hun. 255; *Wheeler v. Morris*, 2 Bosw. 524; *Mills v. Van Voorhis*, 20 N. Y. 412.

A surety of a debt secured by a junior mortgage upon payment of the debt is subrogated to the rights of the mortgagee, and may redeem from a prior mortgages: *Green v. Wynn*, L. R. 4 Ch. App. Cas. 204; *Averill v. Taylor*, 8 N. Y. 44.

A party cannot redeem from his own sale: *McCullough v. Rose*, 4 Ill. App. 149; *Hervey v. Krost*, 116 Ind. 268; *Todd v. Davey*, 60 Iowa, 532; *Lauriat v. Stratton*, 6 Saw. 339.

Parties seeking to redeem must comply strictly with the provisions of the

statute which confers upon them the right to redeem: *Wilson v. Schneider*, 124 Ill. 628; *Biceman v. Finch*, 79 Ind. 511; *Cummings v. Pottinger*, 83 Ind. 294; *Teabout v. Jafray*, 74 Iowa, 29; 7 Am. St. Rep. 466; *Waller v. Harris*, 2 Wend. 555; 32 Am. Dec. 590; *Ex parte Bank of Monroe*, 7 Hill, 177; 42 Am. Dec. 61; *Hill v. Walker*, 6 Cold. 424; 96 Am. Dec. 465; *Busing v. Cook*, 85 Tenn. 332; 4 Am. St. Rep. 765.

The equity of redemption is inseparably annexed to a mortgage, and cannot be disannexed therefrom even by the express stipulation of the parties: *Stephens v. Sherrod*, 6 Tex. 294; 55 Am. Dec. 776.

A restriction of the right of redemption to the mortgagor personally is inconsistent with the nature of a mortgage, and void: *Johnston v. Gray*, 16 Serg. & R. 361; 16 Am. Dec. 577.

RENIHAN v. WRIGHT.

[125 INDIANA, 588.]

HUSBAND AND WIFE MAY MAINTAIN JOINT ACTION FOR BREACH OF CONTRACT OF BAILMENT WHEN. — Where a husband and wife enter into a contract of bailment with a person, and compensate him for such bailment, they are entitled to maintain a joint action against him for a breach of such contract. And while in such an action the matters charged in the complaint partake largely of the nature of a tort, yet if they are so intimately connected with the contract of bailment, also alleged in the complaint, as to be incapable of separation from it, this will constitute such a unity of interest in such husband and wife as will give them the joint right to maintain the action.

BODIES OF THE DEAD BELONG TO THE SURVIVING RELATIVES, in the order of inheritance, like other property, and such relatives, and not the executor or administrator, have the right to the custody and burial thereof.

Plea of SATISFACTION INSUFFICIENT WHEN. — Where the complaint in an action alleges that the plaintiffs employed the defendants to take care of and safely keep in a secure vault the body of their deceased daughter until they should be prepared to inter the same; that the defendants did not safely keep said remains, but carelessly and negligently took or allowed the same to be taken and buried, or otherwise disposed of, and wrongfully refused to inform the plaintiffs where said remains had been removed to, — an answer alleging that the defendants, by mistake, had shipped the body to some point of interment not remembered by them at the time the plaintiffs demanded the body; that they so notified the plaintiffs, and promised them to immediately find and return the body; that the plaintiffs expressed themselves as satisfied with this arrangement; that shortly afterwards the defendants returned the body, which was taken and interred by the plaintiffs; and that the return of the corpse was taken and received by the plaintiffs in full and perfect satisfaction of all wrongs and injuries incident to the mistake made by the defendants — is bad, because it makes no averment that the plaintiffs agreed with the defendants that they would accept such return in satisfaction of the cause of action alleged in the complaint. The averment at the close of the answer, that the return was so received and accepted,

is a statement of a mere conclusion, not warranted by any premises preceding it.

MENTAL ANGUISH, RECOVERY MAY BE HAD FOR, WHEN.—The jury in assessing damages for the breach of a contract may take into consideration the mental anguish of the plaintiffs, if they suffered any mental anguish on account of the matters set out in the complaint. If a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part.

ACTION to recover damages. The opinion states the case.

B. F. Davis, for the appellants.

C. E. Clark, for the appellees.

COFFEY, J. In this case the complaint alleges that appellees, being husband and wife, on the tenth day of December, 1884, employed the appellants, who were undertakers and funeral directors in the city of Indianapolis, to take charge of and safely keep in a secure vault the body of the deceased daughter of the appellees until such time as they might be prepared and ready to inter the same; that appellants, in pursuance of such employment, took charge and possession of said remains, and placed the same in a vault, and that the appellees compensated the appellants to safely keep the said remains therein until such time as they might be prepared and ready to inter the same; that the said appellants did not safely and securely keep said remains, but carelessly and negligently took or allowed the same to be taken and buried, or otherwise disposed of, and wrongfully refused, and still refuse, to inform the appellees where said remains have been removed to, further than to say, "Your child is in Ohio"; that by reason thereof appellees have suffered great distress of mind, and are damaged in the sum of five hundred dollars, etc.

The court overruled a demurrer to this complaint, whereupon the appellants filed an answer in three paragraphs.

The court sustained a demurrer to the second paragraph of said answer, and a trial of the cause by a jury, upon issues formed, resulted in a verdict for the appellees, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of error calls in question the correctness of the ruling of the court in overruling a demurrer to the complaint, in sustaining a demurrer to the second paragraph of the answer, and in overruling the motion of the appellants for a new trial.

The appellants claim that the complaint is not sufficient, — 1. Because it does not show a cause of action in favor of both of the appellees; 2. Because the right to control a corpse, and superintend the burial thereof, is in the executor or administrator, and not in the next of kin, and for this reason the complaint does not state a cause of action in favor of either of the appellees.

It is settled that where a complaint does not state a cause of action in favor of all the plaintiffs, it is not sufficient to withstand a demurrer: *Nave v. Hadley*, 74 Ind. 155; *Yater v. State*, 58 Ind. 299; *Neal v. State*, 49 Ind. 51. But if any cause of action exists in favor of the appellees in this case, we think it is joint.

It is alleged, substantially, in their complaint, that both the appellees entered into the contract of bailment therein set out with the appellants, and that they jointly compensated the appellants for such bailment. It follows, we think, that they are entitled to maintain a joint action for a breach of such contract. The appellants are in error in assuming that the complaint sounds wholly in tort, and that there is no community of interest existing in the appellees.

While it may be true that the matters charged partake largely of the nature of a tort, yet they are so intimately connected with the contract of bailment alleged in the complaint as to be incapable of separation from it; and in this consists the unity of interest which gives the joint right to prosecute the action.

The second objection urged against this complaint presents a much more difficult question. The decided cases bearing upon the question are somewhat confused, and are not free from conflict. This confusion and conflict arise, no doubt, in the attempt on the part of some of the courts, in this country, to follow the decisions of the courts in England, while other courts have asserted that the rule of decision in that country can have no application in the American courts. It is quite clear to us that but little light can be had upon the question now under consideration from the decisions found in the English reports, for the reason that the jurisprudence of that country is peculiarly compounded, embracing largely the ecclesiastical element, not found in our jurisprudence. In that country the partition of judicial authority between the church and the state has materially narrowed the powers and actions of the common-law courts. This condition is peculiar

to England, and for that reason the English decisions upon questions kindred to the one before us should not exert any controlling influence over the courts of this country, where no such partition exists. It is asserted, and perhaps truthfully, that Cuthbert, Archbishop of Canterbury, first introduced burial in church-yards in England, in the year 750.

The exclusive power of the ecclesiastics, denominated "ecclesiastical cognizance," became both executive and judicial soon after the Norman Conquest. It was executive in taking the dead body into actual possession and guarding its repose in consecrated ground, and it was judicial in deciding all controversies involving the possession or the use of holy places, as well as in adjudicating upon the question as to who should be allowed to lie in consecrated earth, and in fact who should be allowed to be interred at all. The clergy monopolized the judicial power over the subject of burial; while the secular courts, stripped of all authority over the dead, were confined to the protection of the monuments or other external emblems of grief erected by the living.

The heir could maintain no action in the common-law courts for the disturbance of the remains of his buried ancestors, the remedy for such wrong belonging to the parson, in whom was vested the freehold of the soil in which the burial was made: Third Institute, 203.

The power exercised by the ecclesiastical tribunals of England is not spiritual, but temporal and judicial. It is a legal secular authority which they have gradually abstracted from the ancient civil courts, to which it had originally belonged. It will thus be seen by this brief review of the law in England, upon the subject now in hand, that the decisions of the courts of that country upon the subject of the right of relations to control the bodies of the dead are not authorities in this country. As we have no division of power between the church and the state in this country, it follows that much of the power exercised by ecclesiastical tribunals in England is vested, of necessity, in the secular courts, here charged with the general administration of the law.

The necessity for the existence and exercise of such power must be apparent to all. Without it the right to take the exclusive control of a corpse, and care for and bury it, could not be enforced. The father could not legally protect the remains of his children, or the husband of his wife, in the

absence of such power. While the law might punish the body-snatcher who desecrated the grave, it would be powerless to restore the body to the relatives. The courts in this state, in our opinion, possess the power to enforce the rights of the appellees in this case to the body of their deceased daughter, if the law gives them the right to its custody, and the right to give it decent burial; and they also possess the power to assess such damages as may accrue to them on account of being deprived of such right.

It will not do to say that the custody of a corpse belongs to the executor or administrator of the deceased, and that it must be interred by him, for under our law no letters of administration can be granted, except to relatives, for the period of twenty days after death. In the event of the inability of the relatives to give the bond required by law, no provision for the burial could legally be made during that period. Certainly, our law-makers did not understand that no one except an executor or administrator had the legal right to the custody and burial of a corpse. Then in whom is the right vested? In the case reported in 4 Bradford, 503, this question is fully considered and passed upon by the supreme court of New York. In that case, as appears by the report, in widening Beekman Street, in the city of New York, the commissioners, in estimating the assessments, awarded to a corporation known as the Brick Presbyterian Church twenty-eight thousand dollars as the value of a certain piece of land taken for that purpose.

The names of all the persons interested in the land not being known, the money was paid to the chamberlain of the city of New York, to abide the order of the court. In the parcel of land so taken were embraced certain vaults for the burial of the dead, in which various individuals claimed rights of interment, and the use thereof as vaults for the burial of the dead. The corporation, the Brick Presbyterian Church, was entitled to the whole of said sum, subject to the rights of said vault-holders. The question of the rights of the respective parties in this fund was referred to the Hon. Samuel B. Ruggles, with directions to investigate the facts and report the amount due to each. During his investigation, the remains of one Moses Sherwood were identified by his daughter, Maria Smith, who, acting for herself and sister, and for the descendants of her brothers and sisters, five in all, who had died, claimed that such remains should be reinterred in a separate

grave, in such suitable locality as she might select; that the existing monument be erected over such grave, and that the necessary expenses be defrayed out of the fund in court. It appeared that Moses Sherwood was buried on the strip of ground taken in widening the street, in the year 1801; that the tombstone was erected at the time to mark his grave, and quietly stood there over his remains until they were thrust aside by the city corporation to give place for the cart-ways and foot-walks of Beekman Street as widened.

Mr. Ruggles filed his report, and the cause coming on for hearing at the special term of the supreme court, in April, 1856, the report, as the law of the case, was affirmed. The report contains a statement of the learned referee's investigation of the law of burial, and it is believed to be the most accurate and elaborate collection and statement of the law upon that subject yet published. In commenting upon the question now under consideration, Mr. Ruggles says: "It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose. The dogma of the English ecclesiastical law that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper, moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious ought not to need any judicial precedent. Our courts of justice should place it, at once, where it should fundamentally rest forever, on the deepest and most unerring instincts of human nature, and hold it to be a self-evident right of humanity, entitled to legal protection by every consideration of feeling, decency, and Christian duty. The world does not contain a tribunal that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body?"

The final conclusions reached by Mr. Ruggles upon the subject of the legal aspect of the matters referred to him for his

report were: "1. That neither a corpse nor its burial is legally subject, in any way, to ecclesiastical cognizance, nor to sacerdotal power of any kind; 2. That the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect; 3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin; 4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure."

Following the law as announced by Mr. Ruggles in the report above referred to, this court held, in the case of *Bogert v. City of Indianapolis*, 13 Ind. 134, that the bodies of the dead belong to the surviving relatives, in the order of inheritance, as other property, and that they have the right to the custody and burial of the same.

Our conclusion is, that the custody of the corpse and the right of burial do not belong to the executor or administrator, but to the next of kin, and that the courts of this state possess the power to protect such next of kin in the exercise of such right.

It follows that the court did not err in overruling the demurrer to the complaint in this cause.

The second paragraph of the answer avers that the appellants prepared the corpse named in the complaint for burial on or about the tenth day of December, 1884, and placed the same in a vault wherein were placed the corpses of other children of like age, and in all respects prepared in the same manner for interment; that in consideration therefor the appellees promised and agreed to pay the appellants a fair and reasonable price, which was twenty dollars; that on or about the twenty-ninth day of April, 1885, the appellees notified the appellants that they desired to have their said child interred, when, for the first time, they discovered that said body and corpse had been, by the appellants, shipped by mistake to some point for interment not then remembered by them; that they then and there so notified the appellees, and promised them to immediately find the place of the interment of said body, and without delay return the same to appellees, to which the appellees expressed their satisfaction; that on the fourth day of May, 1885, they learned that said corpse had been shipped to and interred at Ohio, in the state of Pennsylvania, and so notified the appellees, and informed them that they would have said corpse returned by express at their expense, to

wit, the sum of fifty dollars, to which the appellees assented; that immediately thereafter, and before said corpse had time to arrive at the city of Indianapolis, to wit, on the fifth day of May, 1885, the appellees commenced this action; that afterwards, on or about the tenth day of May, 1885, the body of said child was returned to appellants, and was taken by the appellees, and interred; all of which was taken and received by the appellees in full and perfect satisfaction of all wrongs and injuries incident to the mistake made by the appellants in sending said body to the town of Ohio, in place of one of said other like corpses in their said vault; that appellees have failed to pay said sum of twenty dollars, or any part thereof, although the same was past due at the time of the commencement of this suit.

We do not think the court erred in sustaining a demurrer to this answer. It is drawn and proceeds upon the theory that the appellees accepted the acts of the appellants, in the matter of the return of the corpse, in full accord and satisfaction of the cause of action set up in the complaint. The averment found in the answer, at its close, to the effect that a return of the corpse was taken and received by the appellees in full and perfect satisfaction of all wrongs and injuries incident to the mistake, etc., made by the appellants, is the statement of a mere conclusion not warranted by any premises preceding it. It was the duty of the appellants to procure a return of the corpse; and there is no averment in the answer that the appellees agreed with the appellants that they would accept such return in satisfaction of the cause of action upon which the complaint is based.

The only matter urged under the assignment of error, calling in question the action of the court in overruling the motion for a new trial, relates to the instructions in the cause. The court instructed the jury that in assessing the damages they might take into consideration the mental anguish of the appellees, if they suffered any mental anguish on account of the matters set out in the complaint.

In this instruction we do not think the court erred. The case is analogous in principle to the case of *Reese v. Western Union Tel. Co.*, 123 Ind. 294. In that case it was held that the telegraph company was liable for the mental anguish occasioned by its failure to deliver a message in case of extreme illness. The doctrine announced in that case is fully sup-

ported by the cases of *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *Hays v. Houston etc. R. R. Co.*, 46 Tex. 272; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part. The case of *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, is, in some of its features, much like the case now before us. In that case the following telegram was sent to Mrs. Wadsworth, the sister of the deceased:—

“MEMPHIS, October 3, 1887.

“To MRS. T. J. WADSWORTH, Byhalia, Miss.

“Mr. Howell died this morning. Advise us what to do. Will look for some one on morning train.

“R. C. WALDEN.”

The company negligently failed to deliver this telegram. In a suit by Mrs. Wadsworth against the telegraph company, in which she sought to recover damages on account of injury to her feelings in being deprived of the privilege of being present to take charge of the body and to superintend its burial, the learned judge who delivered the opinion of the court said: “To hold that the defendant is not liable in this case for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default would be to disregard the purpose of the telegrams altogether, and to violate that rule of law which authorizes a recovery of damages appropriate to the objects of the contract broken.”

When the appellants contracted with the appellees to safely keep the body of their daughter until such time as they should desire to inter the same, they did so with a knowledge of the fact that a failure on their part to comply with the terms of such contract would result in injury to the feelings of the appellees, and they must therefore be held to have contracted with reference to damages of that character, in the event of a breach of the contract on their part.

After a careful examination of all the questions presented

by the record in this cause, we find no error for which the judgment should be reversed.

Judgment affirmed.

PERSONAL PROPERTY — BODIES OF DEAD PERSONS. — The general rule is, that the dead bodies of persons are not subjects of property: *State v. Doeple*, 68 Mo. 208; 30 Am. Rep. 785; *Griffith v. Charlotte etc. R. R. Co.*, 23 S. O. 250; 55 Am. Rep. 1. Yet the relatives of a deceased have certain rights with respect to his body which the law recognizes: *Pierces v. Swan Point Cemetery*, 10 R. I. 227; 14 Am. Rep. 667. Compare *Weld v. Walker*, 130 Mass. 422; 39 Am. Rep. 465, and note.

DAMAGES — MENTAL ANGUISH AND SUFFERING. — As to when mental suffering may be considered as an element of damages for the breach of a contract, see *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843, and note. Compare note to *Austin v. Wilson*, 50 Am. Dec. 767-775.

BEDFORD BANK v. ACOAM.

[125 INDIANA, 561.]

BANK MAY PAY PROMISSORY NOTE OF ITS DEPOSITOR WHEN. — Where a promissory note, negotiable and payable at a bank, is sent to said bank properly indorsed for collection, it has the right to pay the note out of any general funds of the maker on deposit with it, and charge his account with the amount. One who has drawn such a note cannot be heard to say, after his banker has paid a just debt for which he had given a note, to which the maker claims no defense, that the payment was wholly voluntary and unauthorized. In such a case, the banker who has paid the note is entitled to hold it as the equitable owner or purchaser, and is entitled to set it off in a suit to recover a balance due the depositor on general account.

ACTION to recover the balance of a deposit. The opinion states the case.

J. W. Buskirk, M. F. Dunn, and G. G. Dunn, for the appellant.

J. Giles, for the appellee.

MITCHELL, J. On the eighth day of May, 1888, John W. Acoam had a sum of money on general deposit in the Bedford Bank, in Bedford, Indiana. The bank on that day received a note, indorsed to it for collection, payable by the depositor to Stone, Sons, & Co., at the Bedford Bank. The bank remitted the amount due on the note to its correspondent, and charged the account of its depositor with the sum remitted. This was done without notice to the depositor, or other authority, except such as the law implies from the fact that the note was nego-

liable and payable at the bank, and was duly indorsed and sent to it for collection. The depositor repudiated the act of his banker, and sued the bank to recover an alleged balance, which it is conceded he is entitled to recover, unless the bank has the right to set off the amount of the note above mentioned. There is no question but that the bank acted in good faith, nor is there any dispute but that the plaintiff below owed the note to Stone, Sons, & Co.

It is settled that as soon as money is deposited in a bank, the depositor and the bank assume the relation of debtor and creditor. The money at once becomes the property of the bank, and unless the money deposited was designed for a special purpose, or unless there exists an agreement to the contrary, the bank has the right to apply a sufficient amount of the deposit to the payment of any debt due from the depositor to the bank: *Lamb v. Morris*, 118 Ind. 179. If the Bedford Bank had discounted the note of Stone, Sons, & Co., or taken an absolute assignment to itself of the paper, there would be no dispute about its right to retain the amount due out of the depositor's account. Is the right of the bank to set off the sum admitted to be due on the note destroyed because the amount was paid, not by way of discount, but in consequence of the note having been made payable at the bank? The authorities are not agreed upon the question, but upon principle, and in consonance with the weight of authority, it seems to us the right of the bank to set off the amount must be affirmed. In England, it is the settled rule that if a note is made payable at a particular bank, the maker thereby authorizes the bank to pay it out of his funds on deposit, or by advancing the amount to his credit. Accordingly, in *Roberts v. Tucker*, 16 Ad. & E., N. S., 560, Parke, B., said: "If this were the ordinary case of an acceptance made payable at a banker's, there can be no question that making the acceptance payable there is tantamount to an order, on the part of the acceptor, to the banker to pay the bill to the person who is, according to the law merchant, capable of giving a good discharge for the bill." So in *Kymer v. Laurie*, 18 L. J. Q. B. 218, certain bankers holding in their hands an amount of money on account of a depositor, paid a bill of exchange which had been made payable at their banking-house, when it became due and was presented to them by the holder. No orders to pay the acceptance had been given, nor had the authority contained on the face of the bill been countermanded. It was held that the

bankers had authority to apply the funds of the depositor in their hands to the payment of the acceptance. This rule, with some modifications, has been recognized almost universally by the courts in this country. Accordingly, we find it declared in an early case (*State Bank v. Armstrong*, 4 Dev. 519) that there can be no question that if a bank pays off a note or acceptance of a depositor, payable at the bank, this constitutes a proper debit in the account of the depositor; and in *Mandeville v. Union Bank*, 9 Cranch, 9, Chief Justice Marshall said: "By making a note negotiable in bank, the maker authorizes the bank to advance on his credit, to the owner of the note, the sum expressed on its face."

Many well-considered cases go to the full extent of holding that a note payable at a banking-house is, in effect, the equivalent of a check or draft on the bank in favor of the holder of the note, and that the bank is in default if it allows the paper to go to protest, in case the maker has money due him from the bank on account generally applicable to the payment of drafts or checks: *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 496; *Indig v. National City Bank etc.*, 80 N.Y. 100; *Etna Nat. Bank v. Fourth Nat. Bank etc.*, 46 N. Y. 82; 7 Am. Rep. 314. See also Randolph on Commercial Paper, sec. 1441; Daniel on Negotiable Instruments, sec. 326 a; 2 Morse on Banks, sec. 557; Bolles on Banks and Depositors, sec. 403.

A contrary view has, however, been vigorously maintained: *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479. While we are not inclined to the view that a promissory note negotiable and payable at a bank in this state is in all respects the equivalent of a check drawn by the maker against a fund on deposit in the bank, so as to require the banker to pay the note on presentation out of funds applicable to that purpose, we can conceive of no valid reason why a note or bill thus drawn should not be held to authorize the banker to pay, and thereby become subrogated to all the rights of the holder, to the same extent as if it had purchased the paper after maturity. One who has drawn a note or bill payable at a bank must have done so for some purpose, and he cannot be heard to say, after his banker has paid a just debt for which he had given a note, to which the maker claims no defense, that the payment was wholly voluntary and unauthorized. In such a case the banker who has paid the note is entitled to hold it as the equitable owner or purchaser, and is entitled to set it

off in a suit to recover a balance due the depositor on general account.

The decision in *Scott v. Shirk*, 60 Ind. 160, upon the facts there involved, is not necessarily opposed to the conclusion above. When a note payable at a bank is signed by three persons, one of whom has an account at the bank, it may well be said that the bank has no power to transfer money deposited by one of the makers to the payment of the note, without the depositor's consent: *Lamb v. Morris*, 118 Ind. 179.

The court erred in its conclusions of law upon the facts found.

Judgment reversed, with costs, with directions to the court below to restate its conclusions of law in consonance with this opinion.

BANKS AND BANKING — PAYMENT OF NOTE MADE BY DEPOSITOR PAYABLE AT THE BANK. — When the maker of a negotiable note payable at a bank has at the date of its maturity a general deposit to his credit in the bank sufficient to pay off such note, which deposit is not already set aside for some other purpose, the bank must pay the note, and charge the same against the depositor in relief of his indorsers: *German Nat. Bank v. Foreman*, 133 Pa. St. 474; *post* p. 000. But the contrary rule is laid down in *Grisson v. Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669. Compare also *National Bank of Newburgh v. Smith*, 66 N. Y. 271; 23 Am. Rep. 48, and particularly note 50-52.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

IN RE CAMERON.

[44 KANSAS, 64.]

CRIMINAL LAW — OBTAINING GOODS UNDER FALSE PRETENSES. — Where an agent obtains personal property belonging to his principal, and to the immediate possession of which the latter is entitled, by means of false statements made to a third party, the agent is not guilty of obtaining goods or property by false pretenses. Nothing is a false pretense, within the meaning of the statute, which has no tendency to and does not harm a person.

ORIGINAL petition for and proceedings on a writ of *habeas corpus*.

J. W. Ross, for the petitioner.

W. H. Robb, county attorney, for the state.

HORTON, C. J. The petitioner, Hannah Cameron, alleges that she is illegally restrained of her liberty by the sheriff of Edwards County, under a warrant issued on the twenty-seventh day of March, 1890, by J. Kenneck, a justice of the peace of that county, charging her with having unlawfully, feloniously, and designedly, by false pretenses, obtained from George W. Crawford an organ of the value of ninety-five dollars.

It appears from the agreed statement of facts that Crawford had purchased, in November, 1888, an organ from Mrs. Cameron, who acted as agent; that he had made a cash payment upon the organ, and gave two promissory notes for the deferred payments. The notes were so executed that the payee was entitled to take possession of the organ at any time, if Crawford failed to pay as the notes matured, or if he undertook to

remove the organ from the place where it was. It also appears that he paid upon the organ sums aggregating sixty-six dollars; that at the time Mrs. Cameron came for the organ, on January 8, 1890, there was due upon the last note between thirty-five and forty dollars; that she stated to him "she was the agent of the Western Temple of Music, of which S. R. Huyett was the general manager; that the company had sent her to take the organ on account of the non-payment of the last note; that she would take the organ to her house, at Macksville, in this state, a few miles distant from where Crawford lived, and that he could have the organ at any time by making payment"; that Crawford relied upon these statements, and surrendered the possession of the organ to Mrs. Cameron. Soon afterward, Crawford went to Macksville to see Mrs. Cameron and make the last payment, but found the organ had been taken to Hutchinson, in this state. It further appears, however, that although Mrs. Cameron had been acting as agent for the Western Temple of Music for about two years, and had sold several organs for the company, that the one purchased by Crawford belonged to her daughter, Mrs. Ursula Searles; that she sold the organ to Crawford as the agent of Mrs. Searles; that after the last note was overdue, at the request of her daughter, and as her agent, she obtained possession of the organ from Crawford, who was then in default upon the last note for an amount exceeding thirty dollars. It also appears that Mrs. Cameron believed at the time she went to Crawford's for the organ that he was about to remove with his family to Texas, and take the organ with him.

According to all the testimony, the conditions of the last note which Crawford had executed for the organ were not complied with. It is also conceded that the holder of the note, under its terms, was entitled to the possession of the organ upon default of payment, or if the purchaser undertook to remove the organ from the place where it was. Upon the facts as disclosed by the testimony, Mrs. Cameron has not been guilty of any public offense. Her daughter, Mrs. Searles, was legally entitled to the possession of the organ at the time that Mrs. Cameron made the demand for it. It is true, according to the testimony of Mr. Crawford, that she made false statements concerning the Western Temple of Music, and the order alleged by her to have been given by S. R. Huyett, its general manager; but nothing is a false pretense, within the

terms of the statute, which has no tendency to and does not harm a person. It is not an indictable offense, under the statute, for one to obtain by false statements payment of a debt already due, or personal property to the possession of which he is entitled, because no injury is done.

In *People v. Thomas*, 3 Hill, 169, the defendant was charged with obtaining property by false pretenses, the fraudulent pretense being that a note of the prosecutor which he had for the amount had either been lost or burned, which was known by him to be false; and afterward he negotiated the note to a third person. The court held that the false representation, tending merely to induce one to pay a debt previously due from him, was not within the statute against obtaining property by false pretenses, the court saying: "A false representation by which a man may be cheated into his duty is not within the statute." And in *Commonwealth v. Henry*, 22 Pa. St. 253, Woodward, J., makes use of almost precisely the same language.

In this case Mrs. Searles was entitled to the possession of the organ. Her mother obtained that possession by false statements; but as Crawford was not entitled to the possession of the organ, and Mrs. Cameron obtained it for her daughter and at her daughter's request, no injury was done to Crawford or any one else, and Crawford cannot complain. No crime or offense was committed: Crimes Act, sec. 94; 1 Bishop's Crim. Law, 7th ed., secs. 438, 466; *Commonwealth v. McDuffy*, 126 Mass. 467; *State v. Hollyway*, 41 Iowa, 200; 20 Am. Rep. 586; *State v. Hurst*, 11 W. Va. 54.

If Mrs. Cameron had sold the organ to Crawford as the agent of the Western Temple of Music, and not as the agent of her daughter, Mrs. Searles, yet if at the time she made the demand the notes given by Crawford had not been paid, Crawford had no right to hold or retain possession of the organ. Upon default in failing to pay the notes, or any of them, the payee thereof, not Crawford, was entitled to the possession of the organ. If the testimony of the prosecution is all true, Mrs. Cameron was guilty of statements contrary to the truth and good morals, but she has not rendered herself criminally liable.

It appears from the testimony that Mrs. Cameron was discharged by the probate judge of Stafford County, in this state, upon a writ of *habeas corpus*, on the fifth day of February, 1890; that a full hearing was had of the matters in contro-

versy before the probate judge, and that we are now asked to rule that the determination of the probate judge is final and conclusive, notwithstanding the filing of a subsequent complaint and the arrest thereon. In view of the conclusion we have reached, that Mrs. Cameron is not guilty of any offense or crime, we deem it unnecessary to pass upon the question so forcibly presented.

The petitioner will be discharged.

OBTAINING GOODS UNDER FALSE PRETENSES — WHAT IS A FALSE PRETENSE. — A false pretense is such a fraudulent representation of an existing or past fact by one who knows it to be false as is calculated to induce the person to whom it is made to part with something of value: *Jackson v. People*, 126 Ill. 139. A criminal prosecution cannot be founded upon a false representation which is not calculated to justify a reasonable man in placing reliance thereon: *State v. Burnett*, 119 Ind. 392. Compare *Commonwealth v. Eichelberger*, 119 Pa. St. 254; 4 Am. St. Rep. 642, and note; *State v. Hall*, 76 Iowa, 85; 14 Am. St. Rep. 204, and note. A defendant was properly found guilty of obtaining money under false pretenses, where he was proved to have falsely represented himself to be a lawyer from Chicago, the agent of a loan company organized to loan money throughout the southern states, by means of which representation he obtained from the prosecuting witness thirty-five dollars as a fee for examining the title to his land, which he represented must be done before any money could be loaned: *Bobbitt v. State*, 87 Ala. 91. A defendant was found guilty of obtaining money under false pretenses, where he falsely represented himself as owner of 383 steers, which he undertook to sell to the prosecuting witness for the sum of two thousand dollars, having executed to him a bill of sale and received from him the purchase-money: *State v. Jackson*, 42 Kan. 448. One who obtained goods by executing a chattel mortgage upon property which he falsely represents that he owns is guilty of obtaining goods under false pretenses: *Commonwealth v. Lee*, 149 Mass. 179. A defendant was properly convicted of obtaining property under false pretenses, where, having been entitled to a claim for witness fees against the county, he assigned such claim to a third party, and then obtained his order from the register of deeds upon the false statement that he had not assigned his claim: *State v. Hargrave*, 103 N. C. 328. In *State v. Wilkerson*, 103 N. C. 337, defendant was convicted under an indictment charging false pretense, where the pretense alleged and proved was, that he had represented "that a certain bay horse, which he . . . then and there had, was sound, and not lame, whereas in truth and in fact the said bay horse was not sound, and was lame from a diseased shoulder," which representation he made, knowing it to be false. To constitute the offense of obtaining money or property under false pretenses, it is not necessary that the thing obtained should be of the value which would constitute grand larceny if it were stolen: *Jackson v. Commonwealth*, 86 Ky. 1.

STATE v. SMITH.

[44 KANSAS, 76.]

JURY AND JURORS — SICKNESS OF JUROR MUST BE ESTABLISHED IN PRESENCE OF ACCUSED. — Where, upon the trial of a person accused of felony, the jury, after hearing the evidence, are allowed to separate and go to their homes, and the inability of a juror to attend because of sickness commencing during the recess is reported to the court, the fact of the sickness of such juror must be established as any other fact is established in a court of justice, in accordance with judicial methods, including the right of the accused to be present, and to introduce evidence and cross-examine witnesses; and it is reversible error for the court, of its own motion, or from mere reports unverified by affidavits or unsupported by oaths administered in open court, and in the absence of the accused, to determine that there exists, because of the sickness of such juror, an unavoidable necessity that the remaining jurors should be discharged without verdict, and by such an arbitrary exercise of judicial discretion deprive the accused of the plea of once in jeopardy.

JURY AND JURORS — RECORD MUST SHOW FACTS AUTHORIZING DISCHARGE OF JURY. — When an order is made by a trial court discharging a jury without verdict, to which has been committed the question of the guilt or innocence of a person accused of crime, the record must show affirmatively the existence of the fact or facts which induced such order and justified the exercise of such extraordinary power.

JURY AND JURORS — EVIDENCE TO ESTABLISH SICKNESS OF JUROR. — A letter purporting to have been written by a sick juror to the trial judge is not admissible in evidence to establish the sickness, in the absence of any preliminary proof of the genuineness of such letter.

O. F. Foley and W. E. Borah, for the appellants.

L. B. Kellogg, attorney-general, and *J. W. Brinkerhoff*, county attorney, for the state.

SIMPSON, C. At the regular January term, 1890, of the district court of Rice County, the appellants, James Smith, John Smith, and Martin Smith, were placed upon their trial, charged with burglary and larceny. They waived arraignment, entered a plea of not guilty, a jury was sworn, and the state and the defendants both submitted their evidence. All this took place on the tenth day of January. When the court met on the morning of the 11th of January, counsel for appellants asked permission to introduce further evidence in their behalf. The jurors were called, and all were present and took their seats in the jury-box; and thereupon Frank Fry, a juror, stated to the court that he was unable to sit as a juror on that day, on account of sickness; and upon this statement the court adjourned the hearing of the case until the thirteenth day of January. When the court met on the 13th, and the jury were called, all were present except two jurors, John

Johnson and John Kelly. The court was informed that these two jurymen were sick, and an adjournment was ordered until the morning of the 14th of January. On that morning, all the jurors were present and ready for duty except John Kelly. The jury were permitted to separate until five o'clock, P. M., of that day (the 14th of January). At five o'clock, P. M., the jury were again called, and it appearing that the juror Kelly was still absent and reported sick, the trial court discharged the jury from any further consideration of the case. During all this day, except during a short time in the morning, the defendants were absent from the court-room, being confined in the Rice County jail. They were not present at the time the jury were discharged, but their attorneys were in attendance, and objected to the discharge of the jury. The trial court entered on the journal the following order discharging the jury:—

"Afterward, to wit, on the fourteenth day of January, 1890, and just before adjourning for supper, court being duly convened, the said jury was by the clerk called, and all responded to their names except John Kelly, who was then absent from court; and upon inquiry being made regarding the absence of said juror Kelly, the sheriff informed the court that a messenger had been sent for the said juror, John Kelly, and that said messenger stated that said Kelly reported himself too sick to be present in court; that said Kelly did not know when he would be able to be present in court; that he might not be able to come into court for a week; and that said Kelly stated he would come into court as soon as he was able; and the court, being satisfied from the report of said sheriff, and also from a letter received from said juror by said court, purporting to be written by said juror Kelly, that said juror John Kelly was seriously sick, and unable to attend court, thereupon discharged said eleven jurors from the further consideration of said case.

"Whereupon, and at the same time, the defendants being then absent from the court-room and confined in the county jail of Rice County, Kansas, the court discharged the said jury from the further consideration of this cause; to all of which action of the court the defendants by their counsel then and there duly excepted, which exception was by the court allowed; that at the time of the discharge of said eleven jurors, neither of defendants' counsel, Messrs. Borah or Foley, who were present and defendants' said counsel, objected to the dis-

charge of said eleven jurors from said case on the ground that their said clients, James, John, and Martin Smith, defendants herein, were not present in court.

"During all the proceedings had in this cause on the fourteenth day of January, 1890, except upon convening of court in the morning, at which time no proceedings in this cause were had except to adjourn the further hearing of the same till the afternoon of the same day, in order to hear from juror for whom a messenger was sent, the defendants and each of them was absent from the court-room, and were confined in the county jail of Rice County, Kansas.

"Before the said eleven jurymen in attendance upon the trial of said cause were by the court discharged, the court duly inquired of said Foley and Borah if they were willing to proceed with the trial of the cause with the eleven jurors who were able to be and were present, and they replied that they were not willing so to do, but would require a full panel.

"That the continuance from the thirteenth to the fourteenth day of January was made by the court at its own instance, the defendants by their counsel objecting to such continuance."

On the twentieth day of January, 1890, the appellants were arraigned upon the same information upon which they had previously been put upon trial, and objected to being required to plead to the information, on the ground that a jury had once been sworn to try them, and that said jury had been discharged without their consent, in their absence, and while they were confined in the jail, and that they had once been put in jeopardy upon the offenses charged against them in the information. This was overruled. The appellants then filed their plea in abatement, setting up the same facts, and this was overruled. The appellants then pleaded not guilty, and pleaded the same facts in bar. The trial proceeded, and the appellants were convicted of the larceny of goods of the value of \$50.93. A motion for a new trial and a motion in arrest of judgment, in which all these facts were again set forth, were both overruled. The appellants had all proper exceptions noted and saved on all these various rulings; at least they have done enough to fairly present the questions they discuss here for review. Their contention is embraced in these two propositions: That there was no evidence of the sickness of the juror Kelly that authorized the court to discharge the jury, and that such discharge was not legal without the pres-

ence of the appellants. Section 281 of the code provides: "The jury may be discharged by the court on account of the sickness of a juror, or other action or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

Section 208 of the Criminal Code provides: "The proceedings prescribed by law in civil cases, in respect to the impanelling of jurors, the keeping of them together, and the manner of rendering their verdict, shall be had upon trials on indictments and informations for criminal offenses, except in cases otherwise provided by statute."

The court had the right to discharge the jury on account of the sickness of one of the members thereof: *State v. White*, 19 Kan. 445; 27 Am. Rep. 137.

It is insisted upon one side that the determination of the existence of such a sickness rests largely and almost exclusively in the discretion of the court; while the appellants contend that its existence must be established as a fact in accordance with the rules of evidence, and that a trial court cannot, of its own motion, or from mere reports unverified by affidavits or unsupported by oaths administered in open court, determine that there exists such an unavoidable necessity that the remaining jurors should be discharged, and by such an arbitrary exercise of judicial discretion deprive the appellants of the plea of once in jeopardy. The power to so discharge a jury is not to be arbitrarily exercised. One of the constitutional rights of a party charged with crime is, that he is not to be twice put in jeopardy for the same offense; and the power of a court to discharge a jury which has been sworn to pass upon the question of his guilt and innocence must be exercised with a view to preserve inviolate his constitutional right in this respect. The sickness of a juror is one of those unavoidable necessities which arise, beyond the power of the court or the prosecution to foresee.

It seems clear on principle, as well as in view of the constitutional privileges of the prisoner, that this authority cannot be arbitrarily exercised; for in the language of the supreme court of the state of Pennsylvania in the case of *Commonwealth v. Clus*, 8 Rawle, 498, "Why it should be thought that the citizen had no other assurance than the arbitrary discretion of the magistrate for the enforcement of the constitutional principle which protects him from being twice put in jeopardy

of life or member for the same offense, I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the most palpable abuse of it but an interposition of the power to pardon, which is obnoxious to the very same objection. Surely every right secured by the constitution is guarded by sanctions more imperative. But in those states where the principle has no higher sanction than what is derived from the common law, it is nevertheless the right of the citizen, and consequently demandable as such. But a right which depends upon the will of the magistrate is essentially no right at all; and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules."

This was said in a capital case, but the language of the section of the bill of rights in our state constitution is broad enough to include all felonies. It seems, however, to be the rule in all grades of felony that the only justification for the exercise of the power of a trial court to discharge a jury which has heard the evidence in a criminal case is the existence of an absolute necessity for the discharge. Some unforeseen fact must intervene beyond the power of the court to control, before such a power can be legally exerted. The existence of this unforeseen fact that operates to stop the deliberation of the jury and prevents a verdict must be judicially ascertained and determined. That is to say, if the sickness of the juror does not occur in the immediate presence of the court, but commences during a recess and is reported, the fact of sickness must be established as any other fact is established in a court of justice, in accordance with the rules of evidence governing such matters. When an order is made by a trial court discharging a jury without verdict, to which has been committed the question of the guilt or innocence of a prisoner charged with a crime, the record ought to show affirmatively the existence of the fact which induced such order and justified the exercise of such extraordinary power. This much seems to be demanded in order to preserve to the prisoner the full benefit of the constitutional requirement in his behalf.

The case of *Conklin v. State*, 25 Neb. 784, illustrates this view. Section 485 of the Criminal Code of that state provides: "That in case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is no probability of agreeing, the court shall, upon direct-

ing their discharge, order that the reasons for such discharge shall be entered on the journal; and such discharge shall be without prejudice to the prosecution."

The journal showed this order: "Come also the jury, . . . and report in open court their inability to agree upon a verdict in this cause; and it appearing to the satisfaction of the court, upon examination of M. L. Brown, one of the jurors in said case, that by reason of his sickness he was unable to further perform his duties as a juror, and upon further examination of each and every juror in said case, the court finds that there is no probability of the jurors agreeing upon a verdict, and that they had been out twenty-one hours without sleep, or a suitable place to sleep or rest, said jury is therefore discharged without day, without prejudice to the prosecution."

Commenting on this journal entry, the court says: "The sickness of a juror is one of the causes recognized by the statute above quoted for the discharge of a jury; but it is submitted that such sickness is classed with 'other accident or calamity requiring their discharge,' and it appears to me that such sickness must be of a sudden and calamitous character, and of such a nature as to render his further detention in the jury-room manifestly improper. It does not appear here that the jury reported the sickness of one of their number, or that the juror himself claimed to be sick, or incapacitated on account of sickness from further service on the jury; nor in what the examination of the juror by the court consisted; nor whether the advice and services of a physician were had to ascertain and advise the court of the condition of the juror. Again, it does not appear that the jury were discharged solely on account of the sickness of this juror, but, on the contrary. I think that, taking the whole journal entry together, it fairly appears that the sickness of the juror was not such that the court would have discharged the jury for that cause alone. If the sickness of this juror was such that his further service on the jury was impossible, what was the necessity, or even the propriety, of further examining each and every juror as to the probability of their agreeing upon a verdict, the length of time they had been out without sleep, or a suitable place to sleep or rest?"

The logic of this case seems to require that there should, in effect, be a finding of fact as to the incapacity of the juror, by reason of sickness, to properly discharge his duty. In the case of *State v. Shuchardt*, 18 Neb. 454, Judge Maxwell says: "It

was never intended to permit a court arbitrarily to discharge a jury for disagreement, until a sufficient time had elapsed to preclude all reasonable expectation that they will ever agree."

In the case of *Dobbins v. State*, 14 Ohio St. 493, the court, commenting on the power to discharge juries in criminal cases, say "that this power does not rest upon the arbitrary or uncontrollable discretion of the judge presiding at the trial, but is a legal discretion, to be exercised in conformity with known and established rules; and finally, unless the facts stated in the record clearly establish a case of necessity, the discharge will operate as an acquittal of the accused, and preclude his further prosecution."

This court, in the case of *State v. White*, 19 Kan. 445, 27 Am. Rep. 137, by the chief justice, says, that where the jury have deliberated so long, without finding a verdict, as to preclude a reasonable expectation that they will agree, they may be discharged, if the record shows a necessity for such action, without the consent of the defendant, and the prisoner be tried by another jury. All these authorities require that there must be a legal showing, made and entered on the record, of the necessity for the discharge, and of the existence of the facts that authorize the exercise of the extraordinary power of the court.

Now, the record in this case shows that one of the causes for which the trial court is authorized to discharge a jury in a criminal case, by the statute of this state, happened on this trial, to wit, the sickness of a juror. This sickness did not happen in the immediate presence of the court. The juror took sick at home, during a recess of the court, and the fact of sickness had to be established in accordance with the rules that govern in all cases when a fact is to be judicially established, and made a finding upon which to base a legal conclusion or a judicial action. Then, in accordance with these authorities quoted, and in view of the constitutional rights of the appellants and the requirements of section 207 of the Code of Civil Procedure, these appellants ought to have been present in person during the investigation and determination of the existence of the fact of sickness. This case is not like that of *State v. White*, 19 Kan. 445, 27 Am. Rep. 137, where the jury were discharged because there was no reasonable probability of their agreement. In such cases, a consulting jury is in legal contemplation always in the presence of the court. All their reports, of every kind and character, are made directly

to the court, and the court alone has the sole right to question them as to the probabilities of an agreement. In the very nature of things, as no one is allowed to be present at their deliberations, a determination by the court as to whether or not there is a reasonable probability of their agreement must be made on the report of the jury.

So the language of the court in the case of *State v. White*, 19 Kan. 445, 27 Am. Rep. 137, as to the absence of the defendant at the time of the discharge of the jury, cannot be fairly applied in a case like this, when the fact alleged as justifying a discharge of this jury happened out of the presence of the court, and while the jury were temporarily discharged from attendance in court. In one case, the court acts on an official report made by the jury, which the defendant has no right to question; in the other, an inquiry as to the existence of a fact alleged to have occurred away from the presence and observation of the court is to be made by judicial methods, and these include the presence of the parties interested, their right to introduce evidence, and cross-examine witnesses. We think that error was committed in determining the sickness of a juror as a cause for the discharge of the jury, in the absence of the appellants.

It is evident from the record that error was also committed on the trial of the issue of fact made by the plea in abatement filed by the appellants, and the replication filed by the county attorney. This issue of fact was the sickness of the juror Kelly; and to maintain the issue on the part of the state, the county attorney was permitted, over the objection of the appellants, to read in evidence a letter purporting to have been written by the juror Kelly to the trial judge, without any preliminary proof whatever of its genuineness. For these errors, there must be a reversal; and for the reasons suggested by the court in the case of *Conklin v. State*, 25 Neb. 784, we prefer this course, rather than to pass upon the other question before all the facts are fully and fairly presented. This accords, too, with the case of *State v. Myrick*, 38 Kan. 238.

We recommend that the judgment of the district court be reversed, and the cause remanded, with instructions to grant the appellants a new trial.

The COURT. It is so ordered.

JURY, UNAUTHORIZED DISCHARGE OF, EFFECT OF.—The discharge of a juror, or of the whole jury, without sufficient cause, amounts to an acquittal, so that the plea of *autrefois acquit* will be good made at a subsequent trial: *O'Brien v. Commonwealth*, 9 Bush, 333; 15 Am. Rep. 715; *People v. Caga*, 43 Cal. 323; 17 Am. Rep. 436; *Mahala v. State*, 10 Yerg. 532; 31 Am. Dec. 591, and note. The discharge of the jury in the absence of the accused is illegal, and therefore discharges the defendants: Note to *State v. McKee*, 21 Am. Dec. 507.

BROWN v. JAMES H. CAMPBELL COMPANY.

[44 KANSAS, 287.]

CHATTAL MORTGAGES—SALE OF PROPERTY BY AGENT—LIABILITY TO MORTGAGEE.—A valid chattal mortgage properly recorded, though overdue and unpaid, is notice to the world, and though the possession of the property covered by the mortgage is in the mortgagor, a commission merchant who receives and sells it as the consignee of the wife of the mortgagor, and as her property, and then pays the proceeds of the sale to her as his consignor, without any actual knowledge on his part of the existence of the mortgage, and without the knowledge or consent of the mortgagee, is liable to the latter as for a conversion of the property.

Shinn and Yeager, and W. H. H. Freeman, for the plaintiffs in error.

Alden and McGrew, for the defendant in error.

VALENTINE, J. This was an action brought in the district court of Wyandotte County by George W. Brown and C. W. Brown, partners as Brown Brothers, against the James H. Campbell Company, a corporation and a live-stock commission merchant, to recover from the defendant the sum of fourteen hundred dollars, with interest, for the alleged conversion of forty-five head of neat cattle belonging to the plaintiffs as mortgagees. A trial was had before the court and a jury, and a judgment was rendered in favor of the defendant; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

The principal facts of the case are, substantially, as follows: On September 27, 1888, C. J. Blanchard, who resided in Cowley County, and who owned and possessed the cattle above mentioned, in that county, mortgaged the same, along with some other personal property, to the plaintiffs. The mortgage was executed to secure a debt of \$2,050, \$600 of the same to become due in thirty days, and the remainder thereof, \$1,450, to become due in ninety days. The mortgage was deposited in the office of the register of deeds on the next day, to wit,

September 28, 1888. There was no stipulation in the mortgage as to who should have the legal title or the possession of the mortgaged property, but the mortgagor was permitted to retain the possession thereof. The mortgaged property was not to be removed from Cowley County. The mortgage debt has never been paid. On February 12, 1889, without the consent or knowledge of the plaintiffs, the cattle were transported by railroad from Cowley County to Kansas City, Wyandotte County, Kansas, in the name of M. A. Blanchard. This M. A. Blanchard was Martha A. Blanchard, the wife of C. J. Blanchard, the mortgagor. The cattle were consigned to and placed in the possession of the defendant, which, as aforesaid, is a corporation and a commission merchant or broker. On the next day, the defendant, in the ordinary course of business, sold and delivered the cattle in four different lots, to different purchasers, received the proceeds of the sale, and paid the same, less commission, over to the consignor, M. A. Blanchard. All this was done without the consent or knowledge of the plaintiffs. The defendant at the time had no actual knowledge of the chattel mortgage, nor any knowledge that any one except the consignor claimed to have any interest in the property.

The case was tried in the court below upon the theory that the plaintiffs were negligent in not taking the possession of the cattle within a reasonable time after the mortgage debt became due, and that if the defendant sold the property and paid over the proceeds to the consignor innocently, without any knowledge of the plaintiffs' claim, and only as a commission broker, it was not liable. For instance, the court gave, among others, the following instructions: —

“ If the jury find from the evidence that said defendant did not purchase the cattle in controversy, and sell and dispose of the same as its own, but that said cattle were shipped by M. A. Blanchard to the defendant as live-stock commission merchants to be sold by said defendant as the agent for and on account of the said M. A. Blanchard, and the proceeds of said sale paid over by said defendant to the said M. A. Blanchard, in the ordinary course of business, without actual notice to said defendant of the rights or claim of said plaintiffs thereto, then said defendant is not guilty of a conversion of said cattle or their proceeds, and you will find for the defendant.

“ If the jury find from the evidence that the plaintiffs permitted the mortgaged property described in the mortgage in-

troduced in evidence in the case to remain in the possession of the mortgagor for a considerable length of time after the conditions of the mortgage had been broken, and that by using reasonable diligence after default in the conditions of said mortgage said plaintiffs could have obtained possession of said property and subjected the same in payment of the debt secured thereby, then I instruct that it was the duty of said plaintiffs so to do within a reasonable time; and if the plaintiffs failed to so take possession of said property and subject it to the payment of said indebtedness within a reasonable time after default in the conditions of said mortgage, they were guilty of negligence, and cannot recover in this action, unless you find that the defendant had actual notice of the plaintiffs' mortgage, in which case you will find for plaintiffs."

The statutes in this state do not in express words enact that a chattel mortgage shall in any case be valid or shall in any case be notice to any person; but by the strongest of implications we think they enact that every chattel mortgage duly and honestly executed, and deposited in the office of the register of deeds, shall be valid, and shall be notice as to all the world for the period of one year unless the mortgage debt is sooner satisfied, and shall remain valid and notice as to all the world for each succeeding year, provided the mortgage debt remains unsatisfied, and provided a sufficient renewal affidavit is filed prior to the expiration of each succeeding year: Mortgage Act, secs. 9, 11. Our statutes also provide that "in the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession": Mortgage Act, sec. 15. In other words, where there are no stipulations to the contrary, the mortgagee is the owner of the mortgaged property, and has the right to the possession thereof from the execution of the mortgage until it is satisfied or ceases to have validity, whether the debt is due or not; and there are no stipulations to the contrary in the present mortgage. Our statutes also provide that when a chattel mortgage is satisfied it shall be the duty of the holder thereof to enter satisfaction thereof of record, and if he fails to do so within thirty days after demand therefor, he is liable to pay a penalty for his failure, of one hundred dollars: Mortgage Act, secs. 8, 16. It will therefore be seen that our statutes require that the existence of every chattel mortgage, and whether it is still valid and in force or not, shall be shown by the records in the office of the register of deeds.

The defendant claims that it is not liable in this action, for several reasons, among which are the following: It claims that it was not bound to take notice of the plaintiffs' mortgage, although it was duly deposited in the office of the register of deeds, and it cites the case of *Frizzell v. Rundle*, 88 Tenn. 396, 17 Am. St. Rep. 908, and also cites *Roach v. Turk*, 9 Heisk. 708; 24 Am. Rep. 860. This is certainly not the law in Kansas, for the implications of the statutes and of all the decisions of this court are certainly to the contrary, and that a chattel mortgage duly executed, and on file in the office of the register of deeds, is notice, as above stated, to all the world. The defendant also claims that the plaintiffs were negligent in not taking the possession of the mortgaged property immediately after the mortgage debt became due, and that for this reason the mortgage ceased to operate, and became void; and it cites the following cases from Montana and Illinois, to wit: *Travis v. McCormick*, 1 Mont. 148; *Reed v. Eames*, 19 Ill. 594; *Cass v. Perkins*, 23 Ill. 382; *Barbour v. White*, 87 Ill. 164; *Reese v. Mitchell*, 41 Ill. 365; *Hansford v. Obrecht*, 49 Ill. 146; *Wylder v. Crane*, 53 Ill. 490; *Lemen v. Robinson*, 59 Ill. 115; *Arnold v. Stock*, 81 Ill. 407; *Dunlap v. Eplar*, 88 Ill. 82. This, we think, is also against the implications of our statutes, and against the views heretofore entertained by the entire bench and bar of this state, and is against the great weight of authority.

The defendant also claims that it is not liable, for the reason that it was only a mere agent or servant of the consignor, transferring the property from the consignor to the purchaser, and asserted no right, title, or interest in or to the property with reference to itself; and it relies upon the cases heretofore and hereafter cited. Among its cases cited in support of this claim is the case of *Rogers v. Huie*, 2 Cal. 271, 56 Am. Dec. 363, where it is held that an auctioneer selling stolen property in the regular course of his business, and paying over the proceeds to the felon, without notice that the goods were stolen, is not liable. This decision, we think, is against all authority, and is not good law: See *Mechem on Agency*, sec. 915, and cases there cited.

The defendant also cites *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289, and *Leuthold v. Fairchild*, 35 Minn. 99, 100. These cases seem to enunciate the doctrine that a mere servant, agent, or carrier who, in good faith, transports the goods from one place to another, or otherwise assists in disposing of the goods,

without asserting or claiming any right, title, or interest in himself, or any right to transfer any right, title, or interest in the property to another, is not liable. This may be correct; but if so, then it will hardly apply to this case. A person can never be held liable for a conversion of personal property unless he claims or asserts some right, title, or interest in himself or in another, adverse to the interest of the owner.

The defendant also cites *Spooner v. Holmes*, 102 Mass. 503, 8 Am. Rep. 491, which seems to decide that an innocent seller of certain stolen negotiable coupons payable to bearer, and which could be transferred by mere delivery, was not liable. For the purposes of this case this may be admitted to be good law, but it does not apply to this case. The case of *Kimball v. Billings*, 55 Mo. 147, 92 Am. Dec. 581, seems, however, to enunciate a different doctrine. The defendant also cites *Hathaway v. Brayman*, 42 N. Y. 322; 1 Am. Rep. 524. In this case it was decided that a mortgagor of chattels in possession has a right, before default, to sell and deliver the mortgaged property subject to the mortgage. This, we think, is good law, provided the mortgagor sells the property in good faith, and without any intent to hinder, delay, or defraud his creditors, and especially the owner of the mortgage debt. If the mortgagor, however, should sell the mortgaged property without reference to the mortgage debt, or with any intent to hinder, delay, or defraud the holder of the mortgage, he would commit a criminal offense, and the sale would in all probability be void: Gen. Stats. 1889, pars. 2233, 2452.

The plaintiffs cite the following cases, among others, with regard to the rights of mortgagees of chattels where innocent parties, without the consent of the mortgagees, have interfered or intermeddled with the mortgaged property: *Coles v. Clark*, 8 Cush. 399; *Sprights v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; *Moloughney v. Hegeman*, 9 Abb. N. C. 403; *Marks v. Robinson*, 82 Ala. 69; *Poole v. Adkisson*, 1 Dana, 110; *Nichols v. Barnes*, 3 Dak. 148; *Phillip Best Brewing Co. v. Pillsbury etc. Elevator Co.*, 5 Dak. 62; *White v. Phelps*, 12 N. H. 382.

The plaintiffs also cite the following among other cases which have no particular relation to chattel mortgages, but which assert the general principles regarding the liability of persons who, as servants or agents of others, interfere or meddle with property not belonging to their master or principal: *Barnhart v. Ford*, 37 Kan. 520; *Kimball v. Billings*, 55 Mo. 147; 92 Am. Dec. 581; *Koch v. Branch*, 44 Mo. 542; 100

Am. Dec. 324; *McCormick v. Stevenson*, 13 Neb. 70. In the case of *Coles v. Clark*, 3 Cush. 399, the *syllabus* reads as follows: "Where the mortgagor of goods, of which the mortgagee had the right of immediate possession by a mortgage duly recorded, induced the mortgagee by false and fraudulent representations to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds paid over to the mortgagor, it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had no knowledge in fact of the existence of the mortgage."

In the case of *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452, a portion of the *syllabus* reads as follows: "Where the mortgagor of chattels in possession thereof, after default in the payment of the mortgage debt, fraudulently delivered them to a third person for sale, representing that they were his property, and the third person, as agent for the mortgagor, sells the chattels, such third person is liable to the mortgagee for the value thereof, notwithstanding he acted in good faith, believing that the chattels were the property of the mortgagor, and paid the proceeds of the sale, which he made, to the mortgagor, without reward for his services."

In the case of *Marks v. Robinson*, 82 Ala. 69, a portion of the *syllabus* reads as follows: "A factor, or commission merchant, receiving and selling cotton for a mortgagor, without actual notice of the mortgage, is liable in trover to the mortgagee, if the mortgage has been properly recorded in the county in which the cotton was raised."

Mr. Jones, in his work on chattel mortgages, 3d ed., section 460, uses the following language: "An absolute sale of the mortgaged property by the mortgagor or any one claiming under him, in exclusion of the rights of the mortgagee, is a conversion of it for which the mortgagee may maintain trover. This is upon the general principle that assuming to one's self the property and right of disposing of another's goods is a conversion. . . . If a mortgagor, for the purpose of defrauding the mortgagee, sends the mortgaged goods to an auctioneer, by whom they are sold, and the proceeds paid over to the mortgagor, the mortgagee may maintain trover for the goods against the auctioneer, although the latter did not participate

in the fraud, and had no knowledge of the existence of the mortgage. In such action the plaintiff need not show that the mortgagor is wholly irresponsible. An absolute sale of the mortgaged property by the mortgagor's assignee for the benefit of creditors is a conversion, and he is liable to an action of trover by the mortgagee."

Mr. Boone, in his work on mortgages, section 280, uses the following language: "If a mortgagor of chattels, or any one claiming under him, sells the entire property, as owner, in exclusion of the rights of the mortgagee, such sale is a conversion of the chattels, and the mortgagee may maintain trover therefor."

Mr. Mechem, in his work on agency, section 915, uses the following language: "An auctioneer who receives and sells stolen property is liable to the true owner as for a conversion, although he acted in good faith and received the property in the usual course of trade. So an auctioneer would undoubtedly be liable as for a conversion, who, having received property for sale from one not having authority to cause it to be sold, proceeded to sell it or to pay over the proceeds after notice of the rights of the true owner, and without his authority; and it has been held that an auctioneer who in good faith received and sold property for one whom he supposed to have the right to direct the sale, but who in fact had no such right, was guilty of a conversion."

Judge Story, in his work on agency, section 312, uses the following language: "*A fortiori*, if the principal is a wrongdoer, the agent, however innocent in intention, who participates in his acts is a wrongdoer also. Thus if an auctioneer should be employed by a sheriff to sell goods at auction, which he had unlawfully seized upon an execution, and if the goods did not belong to the execution debtor, the auctioneer who should sell would be liable to an action for the tortious conversion, equally with the sheriff. So if the agent of a merchant who has received goods from a bankrupt, after a secret act of bankruptcy, should, pursuant to orders from his principal, sell the goods, an action of trover would lie in favor of the assignees against the agent, however ignorant he might be of the defect of title; for a person is guilty of a conversion who intermeddles with the property of another without due authority from the true owner; and it is no answer that he acted as an agent, under the authority of a person supposed at the time to be entitled as the owner."

Judge Cooley, in his work on torts, page *451, uses the following language: "One who buys property must, at his peril, ascertain the ownership, and if he buys of one who has no authority to sell, his taking possession, in denial of the owner's right, is a conversion. The vendor is equally liable, whether he sells the property as his own or as officer or agent; and so is the party for whom he acts, if he assists in or advises the sale. So it is no protection to one who has received property and disposed of it in the usual course of trade, that he did so in good faith, and in the belief that the person from whom he took it was owner, if in fact the possession of the latter was tortious."

Mr. Wait, in his work on actions and defenses, volume 6, page 140, uses the following language: "Every person who aids or assists in the conversion of property, whether with knowledge of the facts or in ignorance thereof, is responsible to the owner for all the damages sustained by him."

In volume 4 of the American and English Encyclopædia of Law, page 108, the following language is used: "The action of trover is founded on the right of property and possession; and, any act of a party, other than the owner, which militates against this conjoint right in law is a conversion. It is not necessary for a manual taking to make conversion, nor that the party has applied it to his own use. The question is, Does he exercise dominion over it in exclusion or in defiance of the owner's right? If he does, that is conversion, be it for his own or another's use. It is conversion if one takes the property of another and sells or otherwise disposes of it without the owner's authority; or if he takes it for a temporary purpose only, in disregard of the owner's right, it is conversion. The word "conversion," by a long course of practice, has acquired a technical meaning, and means detaining goods so as to deprive the owner, or person entitled to possession of them, of his dominion over them. Any carrying away of a chattel for the use of one, without the owner's consent, or for a third party, amounts to a conversion, because it is inconsistent with the general right of dominion which the owner has in it, who is entitled to the use of it at all times and in all places. Such an asportation is conversion."

We think the defendant is liable. The mortgage was valid; it had been executed and deposited in the office of the register of deeds less than one year prior to the sale; the defendant was bound to take notice of the mortgage and of the plaintiffs'

rights thereunder, and in law the plaintiffs were the owners of the property, and had the absolute right to the possession and the control thereof; the defendant sold and delivered this property to different persons, not under the mortgage or subject to the mortgage, but independent thereof, and as the absolute property of M. A. Blanchard, and attempted to give to the purchasers the absolute title thereto, and absolute control and dominion over the same. All this was in violation of the plaintiffs' rights, and rendered the defendant liable to the plaintiffs as for a conversion of the property.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

CHATTEL MORTGAGES — REGISTRATION. — Chattel mortgages, to be valid against creditors and subsequent purchasers and encumbrancers without notice, must be recorded, when the mortgagor retains possession of the property: *Comp. Laws of Kansas, 1879, c. 68, sec. 9; Beamer v. Freeman, 84 Cal. 554.* An allegation that a chattel mortgage was recorded raises the implication that it was properly entitled to record: *Syfers v. Bradley, 115 Ind. 345.* In Michigan, the record of a chattel mortgage ceases to impart constructive notice after the expiration of one year from the date of its filing, but it may be renewed so as to preserve its lien as to all persons except such as have become purchasers or encumbrancers in good faith in the interim: *Wude v. Strachan, 71 Mich. 460.*

A foreign corporation, not a resident of the state of Arkansas, cannot file a chattel mortgage for record, so as to impart notice to creditors of the mortgagor, who sue out executions against the property before the institution of the action to foreclose the mortgage: *Watson v. Thompson L. Co., 49 Ark. 83.*

As to what constitutes a filing or registration of a chattel mortgage, see note to *Becke v. Morrell, 15 Am. St. Rep. 294-296.* A chattel mortgage is deemed filed when it is delivered to and received by the proper officer authorized to record it: *Appleton Mill Co. v. Warder, 42 Minn. 118.* And properly filing the chattel mortgage is equivalent to registration: *Hicks v. Eoss, 71 Tex. 358.* The registration of the mortgage in full by the officer does not invalidate the effect of the registration, provided the provisions of the statute applicable to the record of chattel mortgages are otherwise complied with: *Grounds v. Ingram, 75 Tex. 509.*

A chattel mortgage must be recorded in the county where the mortgagor resides as well as in the county in which the mortgaged property is situated: *Pollak v. Davidson, 87 Ala. 551; Lundberg v. Elevator Co., 42 Minn. 37; King v. Wallace, 78 Iowa, 222.* Where the face of the mortgage shows that the mortgagor resides in the county in which the chattel mortgage was recorded, the burden of proof is upon the person alleging it to show that the mortgage was not recorded in the county where the mortgagor resided: *Brown v. Corbin, 121 Ind. 455.* A chattel mortgage recorded in the proper county is constructive notice to purchasers in adjoining counties: *Hudson v. Du Boe, 85 Ala. 446;* or in any other county into which the mortgaged property may be removed: *Grand Island B. Co. v. Frey, 25 Neb. 66; 13 Am. St. Rep. 478;* compare note to *Kanaga v. Taylor, 70 Am. Dec. 67-72.*

Actual notice of the existence of a chattel mortgage dispenses with constructive notice by recordation thereof: *American W. Works v. Whitney*, 76 Iowa, 400; *Plano Mfg. Co. v. Griffith*, 75 Iowa, 102; *Clapp v. Troubridge*, 74 Iowa, 550. Delay in filing or neglecting to file a chattel mortgage operates as a fraud upon creditors and those persons who become interested in the property supposing it to be unencumbered: *International etc. Co. v. McMoran*, 73 Mich. 467; *Sanger v. Guenther*, 73 Wis. 354; *First Nat. Bank v. Summers*, 75 Mich. 107. A chattel mortgage, made to secure a debt and retained by the maker for a time, when it is filed and notice thereof given to the creditor, who accepts it as security, but who had no prior knowledge of its execution, has no legal existence until delivery, which happens when it is accepted: *Merrill v. Denton*, 73 Mich. 628. The lien of an unrecorded mortgage remains valid after the death of the mortgagor, and may be enforced against the property even after the legal title has vested in the widow: *Wolff v. Perkins*, 51 Ark. 43.

CHATTEL MORTGAGE—SALE OR DISPOSITION OF PROPERTY BY MORTGAGOR.—In *Hicks v. Reddit*, 71 Tex. 358, where the mortgagor of a crop of cotton by agreement obtained a quantity of seed cotton in exchange for a bale of mortgaged cotton, and delivered the seed cotton to the mortgagee upon the mortgage, the mortgaged bale having passed into the hands of subsequent purchasers, it was decided that the mortgagee could not recover the bale of cotton.

AGENCY—LIABILITY OF AGENT.—The agent is personally liable for an unlawful act done under the direction of his principal, equally with the principal: *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416.

BURKE v. BURKE.

[44 KANSAS, 307.]

DIVORCE—ADMISSIONS AS EVIDENCE.—In an action for divorce, admissions of a party against himself are admissible in evidence, if obtained without connivance, fraud, coercion, or other improper means.

DIVORCE—ADULTERY OF BOTH PARTIES.—Divorce is a remedy provided for the innocent party, and one shown to be guilty of adultery cannot have a divorce for adultery committed by the other, when there has been no condonation.

DIVORCE—ADULTERY, PROOF OF.—In an action for divorce on the ground of adultery, the proof must be clear, positive, and satisfactory, and although presumptive evidence alone is sufficient to establish adulterous intercourse, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion. Appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt.

DIVORCE—ADULTERY, PROOF OF.—In an action for divorce on the ground of adultery, proof of frequent opportunity for illicit intercourse, without proof of a will to improve it, will not justify an inference of guilt; it must be further shown that the parties were together under suspicious circumstances not to be easily accounted for unless they had the corrupt design.

James D. Snoddy, A. A. Harris, and Henry E. Harris, for the plaintiff in error.

Biddle and Smith, for the defendant in error.

HORTON, C. J. This was an action brought in the court below by O. W. Burke against Texas Burke, his wife, to obtain a divorce on the ground of her adultery. The alleged *particeps criminis* was A. T. Brook. The defendant answered, denying the allegations of her adultery, and making recriminatory allegations of adultery by the plaintiff. The woman with whom the plaintiff was charged with having committed adultery was Mrs. Olive Meek. Upon the trial, the court granted a divorce to the plaintiff against the defendant, upon the ground of her adultery. She complains of the judgment. Section 650 of the Civil Code reads: "Upon the trial of an action for a divorce, or for alimony, the court may admit proof of the admissions of the parties to be received in evidence, carefully excluding such as shall appear to have been obtained by connivance, fraud, coercion, or other improper means. Proof of cohabitation, and reputation of the marriage of the parties may be received as evidence of the marriage, but no divorce shall be granted without proof."

Upon the evidence of B. B. Boggess and J. W. Cox, it clearly appears that the plaintiff confessed his adultery, as alleged in the answer. The admissions were not obtained by connivance, fraud, coercion, or other improper means; nor were such admissions collusive or for the purpose of a reconciliation with the wife. The plaintiff was present at the trial as a witness in his own behalf. He did not deny or dispute the admissions. The evidence offered on the trial we deem sufficient to establish his guilt.

Divorce is a remedy provided for an innocent party. One shown to be guilty of adultery cannot have a divorce for adultery committed by the other; therefore, as the defendant established her recriminatory or counter charge, the plaintiff was not entitled to any divorce or other relief. It is not claimed that the wife ever condoned the offense of her husband: 5 Am. & Eng. Ency. of Law, 824-826; 2 Bishop on Marriage and Divorce, 6th ed., sec. 80; 2 Greenl. Ev., 15th ed., sec. 52; *Horne v. Horne*, 72 N. C. 530; *Hoffman v. Hoffman*, 43 Mo. 547; *Mattox v. Mattox*, 2 Ohio, 234; 15 Am. Dec. 547.

Further, however, it is extremely doubtful whether there was sufficient evidence introduced upon the trial to establish the adultery of the wife. The proof of adultery, in such a case as this, must be clear, positive, and satisfactory. The evidence should show that actual adultery was committed.

since nothing short of the carnal act can lay a foundation for divorce for this cause. Evidence simply showing full and frequent opportunity for illicit or carnal intercourse is not alone sufficient to found an inference that the criminal act was committed. Although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion; appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt: *Pollock v. Pollock*, 71 N. Y. 137; *Osborn v. Osborn*, 44 N. J. Eq. 257; *Koenig v. Koenig*, 9 Atl. Rep. 750; N. J. Eq., May 28, 1887; *Powell v. Powell*, 80 Ala. 595; *Williams v. Williams*, 67 Tex. 198; *Herberger v. Herberger*, 16 Or. 327; 2 Bishop on Marriage and Divorce, 6th ed., secs. 613-635.

In this case, the evidence showed opportunity between the wife, Texas Burke, and A. T. Brook, but there was no direct proof of the fact of adultery between them. The finding of adultery on the part of the wife is based wholly upon inferences from the fact of opportunity and from the circumstances thereto attending. No letters from the wife to Brook, or from Brook to the wife, were in evidence; no witnesses testified to having seen any kisses, embraces, or undue familiarity between the wife and Brook. Both the defendant and Brook denied under oath the misconduct alleged, and attempted to explain all the circumstances causing the suspicions of the plaintiff. It is also significant that the plaintiff, until after the separation between himself and wife, never said anything to her about her intimacy with Brook, and never talked with Brook about it. When the plaintiff left the defendant he was asked "what reason he had for acting that way." He replied, "he didn't know."

In view, however, of the adultery of the plaintiff, the evidence offered to establish adultery on the part of the wife need not be discussed at length. We have referred to this only to show that under the authorities, if the opportunity merely for adultery is proved, there being no evidence of the will to improve it, this does not justify the inference of guilt; it must be further shown that the parties were together under suspicious circumstances not to be easily accounted for unless they had the corrupt design: *Mayer v. Mayer*, 21 N. J. Eq. 246.

The judgment of the district court will be reversed, and the cause remanded.

DIVORCE — ADULTERY — ADMISSIONS AS EVIDENCE. — An admission by a wife to her husband that she had committed adultery, unsupported by other proof, will not sustain the charge: *Matchin v. Matchin*, 6 Pa. St. 332; 47 Am. Dec. 466, and note. In an action for a divorce *a vinculo*, the admissions of the parties are not competent evidence: *Steel v. Steel*, 104 N. C. 631.

DIVORCE — ADULTERY OF PLAINTIFF AS A DEFENSE. — Where a wife institutes an action for divorce against her husband, he may set up adultery on her part as a defense: *Hubbard v. Hubbard*, 74 Wis. 650. But such a defense cannot be established by the husband's testimony as to the contents of a letter intercepted by him, which is not produced, and the contents of which, as testified to by one to whom the husband showed it, do not corroborate his testimony: *Farmer v. Farmer*, 86 Ala. 322. See note to *Jones v. Jones*, 90 Am. Dec. 610-613.

DIVORCE — ADULTERY, PROOF OF. — The mere charge of adultery made by the wife against her husband, though frequently repeated, is not sufficient ground for a divorce: *McAlister v. McAlister*, 71 Tex. 696. Adultery need not be proved by direct testimony, but may be inferred from circumstances that lead to it by fair inferences as a necessary conclusion: *Matchin v. Matchin*, 6 Pa. St. 332; 47 Am. Dec. 466, and note. The testimony of a detective employed by the wife to watch her husband and procure evidence of his adultery will be given very little weight: *Chapman v. Chapman*, 129 Ill. 386.

DIVORCE — FALSE ACCUSATIONS OF ADULTERY. — False accusations of adultery made by one spouse against the other entitle the latter to a divorce: *Eggerth v. Eggerth*, 15 Or. 628.

DIVORCE — PLEADING AND PRACTICE. — The complaint in an action for divorce on the ground of adultery must aver the time and place, and the person with whom, the act was committed: *Freeman v. Freeman*, 39 Minn. 570. But in alleging the time it will be sufficient if the month and year are correctly given, without specifying the exact day: *Scheffling v. Scheffling*, 44 N. J. Eq. 438. One seeking a divorce need not make the negative allegation that he himself is not guilty of adultery: *Steel v. Steel*, 104 N. C. 632.

MISSOURI PACIFIC RAILWAY COMPANY v. GEDNEY.

[44 KANSAS, 329.]

RAILROADS — LIABILITY FOR KILLING ANIMALS UPON TRACK. — Where a railway passes through a level country it is not enough that the servants in charge of a train use diligence to avert injury after they see an animal upon the track; but it is their duty to keep a vigilant lookout for objects and animals approaching or in dangerous proximity to the track, and if the circumstances indicate that there is danger that they will get upon the track, to use the means which they possess, such as sounding the whistle and ringing the bell, for driving them away.

W. A. Johnson, for the plaintiff in error.

Kirk and Bowman, for the defendant in error.

JOHNSTON, J. This was an action brought by Harry Gedney to recover for a cow killed by a train of the Missouri

Pacific Railway Company, at a crossing of a public highway in Anderson County, and resulted in a verdict of thirty dollars, in favor of the plaintiff.

The railway company insists that the findings and verdict of the jury are not sustained by the evidence. The cow killed was one of several that were grazing on the highway, near to the crossing on the railroad, on the morning of the accident. Some of them were upon one side of the track and some upon the other, when a freight train, traveling at the rate of fifteen miles an hour, passed along the road and over the crossing. Shortly before the train reached the crossing, the cow stepped upon the track, and was struck and killed; the principal question tried was, whether those in charge of the train exercised due care, under the circumstances, to avert the injury. The jury found that they did not. It is found that they failed to keep a vigilant lookout for stock or obstructions on the track, and failed to sound the whistle or ring the bell when approaching the crossing, and failed to do that which was necessary in order to avoid a collision. We think there is sufficient evidence in the record to support the findings and verdict. It is true, the jury found that the engineer did not discover the cow going upon the track until the engine was within twenty feet of her, and that the train was then going at the rate of fifteen miles an hour, and could not have been stopped after the cow came upon the track, and before she was struck. It is also true that the engineer and fireman testify that they were vigilant in looking out along the line of the road to see if there were any objects ahead, or animals dangerously proximate to the track; and further, that they sounded the whistle as they approached the crossing, and as soon as they saw the cow, that they reversed the engine, and endeavored to stop the train. The testimony of Gedney, however, is to the effect that the whistle was not sounded, nor any danger signal given, eighty rods from the crossing, nor at any time afterward, before the cow was struck. There is also testimony that the ground was level near the crossing, and that there were no obstructions to prevent the engineer and fireman from seeing the cattle on the side of the track for a distance of half a mile or more, and that although the cattle were in plain view and approaching the track, no alarm was given to drive them away from the track. If the engineer and fireman were at their posts, and kept a lookout for obstructions, and an animal not seen by them came suddenly upon the track when there was

not sufficient time or opportunity to frighten her away, or where they could not, by ordinary diligence, avoid a collision, the company would not be liable. It is not enough, however, that they used diligence to avert the injury after they saw the cow upon the track; it was their duty to keep a lookout for objects or animals approaching or in dangerous proximity to the track, and if the circumstances indicated that there was danger that they would get upon the track, to use the means which they possessed for driving them away. The sounding of the whistle, or other alarm, eighty rods from the crossing might not have served the purpose of driving the cattle away from the track, but certainly the sounding of an alarm as they approached more closely would have tended to drive the cattle beyond the reach of danger.

There was no direct evidence contradicting the testimony of the engineer and fireman that they kept a vigilant outlook for animals or objects on or near the track; but the testimony that the view was unobstructed along the track for a distance of half a mile or more, and that the animals were in plain view and could have been seen by them for that distance if they had looked, certainly tends to support the finding of the jury that there was negligence in not keeping an outlook ahead of the train. If by a diligent outlook animals approaching or dangerously proximate to the track could have been discovered by the engineer and fireman, their failure to use the ordinary means provided for frightening animals from the track, and to avoid a collision with them, was such negligence as would make the company liable for the injury occasioned. As is stated in *Missouri Pac. R'y Co. v. Wilson*, 28 Kan. 641: "If the employees of the railroad company could by the use of ordinary prudence see, or, seeing the stock on the road, could without danger stop the train and avoid striking the animal, they were required to do so, because the idea is not tolerable that an injury may be inflicted which by ordinary care and diligence may be avoided." The conflict of testimony as to the care and diligence used by the engineer and fireman in respect to keeping an outlook and in sounding an alarm, the topography of the ground near the crossing, and the proximity of the animals to the track, have been settled by the jury, and under well-worn precedents their finding and verdict upon such testimony must be held conclusive.

We think the case was fairly submitted to the jury by the

charge of the court, and that no good reasons for a reversal of the judgment exist.

Judgment affirmed.

RAILROAD COMPANIES — DUTY AS TO ANIMALS ON OR NEAR THE TRACK:
See note to *Memphis etc. R. R. Co. v. Kerr*, 20 Am. St. Rep. 161, 162.

The railroad company is not required to maintain cattle-guards, where it is not obliged to fence its track: *Stern v. Michigan C. R. R. Co.*, 76 Mich. 591. And it is not required to fence, where there are deep cuts or high embankments, even though a public highway may run parallel with the track: *Collier v. Georgia Railroad*, 76 Ga. 611. The company must use ordinary care to keep its cattle-guards free from snow and ice, after notice of their obstruction thereby: *Robinson v. Chicago etc. R'y Co.*, 79 Iowa, 495. Care must be exercised to avoid maintaining defective cattle-guards, and knowledge that many of the cattle-guards are defective puts the company upon notice as to their construction generally: *Missouri P. R'y Co. v. Somers*, 71 Tex. 700.

Depot grounds need not be fenced, and in the absence of negligence, the company is not liable for cattle killed within such grounds: *Moses v. Southern P. R. R. Co.*, 18 Or. 385. The question as to whether the company used a reasonable discretion in throwing open grounds for depot purposes is one of law for the court to decide: *Rinear v. Grand Rapids etc. R. R. Co.*, 70 Mich. 620. A company is not negligent in allowing snow-drifts to remain over its fences: *Patten v. Chicago etc. R'y Co.*, 75 Iowa, 459. A railroad running parallel to another, the tracks being only fifty feet apart, need not maintain a fence between the two, and is not liable for the killing of animals straying from a pasture upon the right of way of the adjoining road and thence upon its own right of way: *Gallagher v. New York etc. R. R. Co.*, 57 Conn. 442. A company is not, in the absence of negligence, liable for killing hogs in a township where they were not permitted to run at large, when they had escaped from their pen even without plaintiff's fault and strayed upon defendant's track, which was fenced by a lawful fence, but not a fence which would have prevented hogs from coming upon the track: *Leedrick v. Republican V. & S. R. R. Co.*, 41 Kan. 756. The rule applicable to injuries to cattle by railway companies applies to a team of horses which escaped from its driver, and, running at will, stopped upon a railway track: *Gulf etc. R'y Co. v. Keith*, 74 Tex. 287.

WINSTON v. BURNELL.

[44 KANSAS, 367.]

PRACTICE. — EVIDENCE WILL NOT BE REVIEWED to determine whether or not it is sufficient to sustain a verdict and judgment, when the case made contains no statement that it embraces all the evidence given at the trial, and the statement upon that subject in the certificate of the trial judge attached to the case made is not sufficient.

ABSOLUTE CONVEYANCE AS MORTGAGE — DEGREE OF PROOF TO ESTABLISH.

— The fact that an absolute conveyance was intended as a mortgage must be established by a clear preponderance of the evidence; or in other words, the proof of that fact must be clear of reasonable doubt.

PRACTION. — ERRORS ASSIGNED ON REFUSAL OF INSTRUCTIONS REQUESTED ARE NOT AVAILABLE when the record fails to show that all the instructions given are preserved in the record.

J. H. Mechem and T. S. Kirkpatrick, for the plaintiff in error.

C. Angevine, for the defendant in error.

JOHNSTON, J. This was an action in ejectment, brought by Alexander Winston against C. P. Burnell, to recover a quarter-section of land situate in Jewell County. The trial in the district court was with a jury, at the November term, 1887, and resulted in favor of the defendant.

The principal errors alleged by the plaintiff are based upon rulings of the court in charging the jury, and upon the sufficiency of the evidence; but the condition of the record is such as to preclude an examination of some of the most important questions presented in the plaintiff's brief. The record contains no recital that the copies of the pleadings found in the case made are those which were filed in the district court, nor are any of the entries of the steps and proceedings taken in the case, and which appear to be copied in the record, properly described or identified. Although very defective in this respect, there is, perhaps, sufficient in the record, such as copies of file-marks, the titles to the various pleadings and orders, and the character of the subject-matter which they contain, to indicate that they belonged to and were filed as a part of the proceedings in the present case. We think there is at least sufficient in the record to resist the motion for a dismissal of the proceeding. We cannot, however, review the evidence to determine whether it is sufficient to sustain the verdict and judgment that were rendered, because the case made as served contains no statement that it embraces all the testimony given on the trial. It has been repeatedly decided that a statement to that effect in the certificate of the judge, which is attached to the case made, is not sufficient: *Eddy v. Weaver*, 37 Kan. 540; *Burlington etc. R. R. Co. v. Grimes*, 38 Kan. 241; *Western Home Ins. Co. v. Hogue*, 41 Kan. 524; *Hill v. First Nat. Bank*, 42 Kan. 364; *Hogue v. Mackey*, 44 Kan. 277.

It appears that Burnell, who was in the possession of the land in controversy, joined with his wife in the execution of a conveyance of the same to the plaintiff. It was in the form of a warranty deed, but Burnell claimed that the conveyance

was intended as a mortgage to secure an indebtedness of one thousand dollars due from him to the plaintiff. This is the main issue in the case, and the evidence thereon is conflicting and unsatisfactory; but in the absence of all the testimony, the approved verdict of the jury is conclusive.

Complaint is made, however, of the charge of the court in respect to the measure of proof necessary to sustain the defense of Burnell. The plaintiff asked for an instruction that parol testimony to establish that an absolute conveyance was intended as a mortgage must be positive, and so clear as to leave no doubt as to the intention of the parties. Instead of giving that instruction, the court charged that "the burden of proving by preponderance of the evidence that said deed was intended only to secure the payment of money rests upon the defendant; and unless he has proved this by a clear preponderance of the evidence, you will find for the plaintiff." A higher and more satisfactory character of proof is required to establish that an instrument or conveyance is not what it purports to be than is necessary in ordinary civil cases. Generally, a mere preponderance is sufficient; but when parties deliberately execute a written conveyance, there is a strong presumption that it expresses their intentions, and more than a bare preponderance of parol proof is required to remove this presumption, and to show a contrary intention. Some of the courts declare that in such cases the proof must be "clear"; others that it must be "convincing"; others that it must be "satisfactory"; and still others that it must be "clear of all reasonable doubt." These expressions substantially convey the same idea, and require the same degree of proof. To establish a fact by the clear preponderance of the evidence, the proof must be clear of reasonable doubt. We think the instruction given was not erroneous: *McMillan v. Bissell*, 63 Mich. 66; *Sloan v. Becker*, 34 Minn. 491; *Gardner v. Weston*, 18 Iowa, 535; *Knight v. McCord*, 63 Iowa, 429; *Miner v. Hess*, 47 Ill. 170; *Kent v. Lasley*, 24 Wis. 654; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Hopper v. Jones*, 29 Cal. 18; *McClellan v. Sanford*, 26 Wis. 595; 1 Story's Eq. Jur., sec. 157; 1 Jones on Mortgages, c. 8; see also *Gabbey v. Forgeus*, 38 Kan. 62.

There are numerous errors assigned on the refusal of instructions requested by the plaintiff, but these are not available. The record fails to show that all the instructions given are preserved in the record, and therefore the court cannot say

that those refused were not given, or that any error was committed by the refusal: See Kansas cases first above cited; also *Wilson v. Fuller*, 9 Kan. 176; *Da Lee v. Blackburn*, 11 Kan. 190; *Ferguson v. Graves*, 12 Kan. 39; *Pacific R. R. Co. v. Brown*, 14 Kan. 469; *Bard v. Elston*, 31 Kan. 274.

The objections to the ruling of the court on the admission of testimony are not material, and furnish no ground for a reversal.

The judgment of the district court will be affirmed.

ABSOLUTE CONVEYANCE AS A MORTGAGE. — A deed absolute in its terms may be shown by parol evidence to have been intended to operate merely as a mortgage: *Tower v. Fets*, 26 Neb. 706; 18 Am. St. Rep. 795, and note; but such evidence must be clear, satisfactory, and conclusive: *Ensminger v. Ensminger*, 75 Iowa, 89; 9 Am. St. Rep. 462, and note; *Sowbrough v. Alcorn*, 74 Tex. 359.

BROOK v. LATIMER.

[44 KANSAS, 431.]

EVIDENCE TO SHOW NOTE TO BE MERELY ADVANCEMENT BETWEEN PARENT AND CHILD. — An absolute promise in the form of a note to pay a certain sum of money, given by a child to a parent, may be shown by parol evidence to be intended between the parties to it as a mere receipt or memorandum to show that the parent has made an advancement of that amount to his child, and that it was the intention of the parent that it should never be collected.

PAROL EVIDENCE TO EXPLAIN WRITING. — The admission of parol evidence tending to show that a promissory note absolute in terms, and given by a child to its parent, is merely intended as between the parties as an advancement by the parent to the child, is not a violation of the rule of evidence which forbids a written instrument to be varied or contradicted by parol.

James D. Snoddy, for the plaintiff in error.

W. A. Johnson, M. L. Ritchie, and J. G. Johnson, for the defendant in error.

SIMPSON C. The plaintiff in error, I. J. Brook, presented to the probate court of Anderson County for allowance a promissory note against the estate of Jessie E. Latimer (who was his daughter, intermarried with Walter Latimer), that reads as follows: —

“\$10,000.

“On demand, I promise to pay to I. J. Brook ten thousand dollars; value received this twelfth day of June, A. D. 1882.

“JESSIE E. BROOK.”

Upon hearing, the probate court disallowed the claim, and an appeal was taken to the district court, where the case was tried by the court and a jury on the same pleadings upon which it was heard in the probate court. These consisted of the verified claim of the plaintiff in error for ten thousand dollars, and the answer of the administrator of the estate of Jessie E. Latimer. This answer denied the execution of the note, denied any indebtedness by Jessie, at the time of her death, to her father, and further alleged that at the marriage of Jessie her father, the plaintiff in error, made an advancement of property and money to her; that she received an advancement out of her father's estate; and that the instrument presented for allowance against her estate was intended only to show the amount of money and property advanced to her whenever it became necessary to make a final settlement and a fair distribution of the estate of her father. The trial in the district court of Anderson County resulted in a verdict and judgment for the defendant in error. A motion for a new trial was overruled, and the cause brought here for review.

The various rulings of the trial court upon the admission of evidence, and the exceptions to the instructions given to the jury, now urged here as erroneous, are all dependent upon the one controlling question as to whether or not an absolute promise in writing to pay a certain amount of money, given by a child to a parent, may be shown to be intended between the parties to it as a mere receipt or memorandum to show that the parent had made an advancement of that amount of property and money to his child, and that it was the intention of the parent that it should never be collected. If in an action such as this, to enforce the payment of the demand note, such a showing is permitted, then this judgment must be affirmed; but if such evidence of intention to make an advancement is not admissible, the judgment must be reversed.

1. An advancement is an irrevocable gift by a parent to a child in anticipation of such child's future share of the parent's estate. In many of the states their statutes prescribe what evidence is necessary to establish the fact of advancement, as in Maine, Massachusetts, and Vermont, where there shall be a declaration to that effect in the grant or gift of the parent, or a charge by the intestate, or an acknowledgment in writing by the child. In some of the states where there are no statutory provisions like those cited from Maine, Massachusetts, and Vermont, it has been held that the declarations of the

parent before, after, and at the time of the transaction are admissible in evidence to show the intention to make an advancement: *Mitchell v. Mitchell*, 8 Ala. 414; *Autrey v. Autrey*, 1 Ala. Sel. Cas. 542; *Butler v. Merchants' Ins. Co.*, 14 Ala. 777; *Merrill v. Rhodes*, 37 Ala. 449; *Smith v. Smith*, 21 Ala. 761; *Fennell v. Henry*, 70 Ala. 484; 45 Am. Rep. 88; *Phillips v. Chappell*, 16 Ga. 16; *Dillman v. Coz*, 23 Ind. 440; *Woolery v. Woolery*, 29 Ind. 249; 95 Am. Dec. 630; *Middleton v. Middleton*, 31 Iowa, 151; *Cecil v. Cecil*, 20 Md. 153; *Graves v. Spedden*, 46 Md. 527; *Kingsbury's Appeal*, 44 Pa. St. 460; *Morris v. Morris*, 9 Heisk. 814; *Watkins v. Young*, 31 Gratt. 84.

Our statute provides "that property given by an intestate by way of advancement to an heir shall be considered part of the estate, so far as regards the division and distribution thereof, and shall be taken by such heir toward his part of the estate at what it would now be worth if in the condition in which it was so given him. But if such advancement exceeds the amount to which he would be entitled, he cannot be required to refund any portion thereof": Gen. Stats. 1889, pars. 2617, 2618.

These statutory provisions render us no aid in the solution of the question we are considering, as they establish no rule of evidence by which the fact of advancement can be shown. While there are numerous decisions of this court contained in almost every volume of our reports upon questions affecting the admission of parol testimony to vary or contradict the express terms of a written contract, the exact question here presented has not been discussed or decided. The various cases in this state alluded to in the briefs of counsel do not, in our judgment, in any way indicate or control the decision of the case at bar.

The question of advancement in all cases is entirely dependent on the intention of the donor. That intention can be best ascertained by the declarations of the parent at the time of the transaction, and by his acts done and performed in pursuance of his declarations. In many cases his declarations made prior to the advancement, or his statements made thereafter, are admissible to establish the fact. It may be established by the adoption of a particular rule or system in the treatment of his children, with respect to gifts or loans of money, or by a general policy adopted with reference to his donations to the members of his family. The doctrine of advancement is in aid of that equal and impartial distribu-

tion of the estate of an intestate that has become the fixed policy of this state by long-continued statutory enactment, so that equality between the heirs is equity as well as statutory command. We do not deem the admission of evidence tending to show that a promissory note absolute by its express terms is a mere evidence of an advancement by a parent to a child to be a violation of that rule of evidence that forbids a written instrument to be varied or contradicted by parol. The numerous reported cases, including deeds that recite a moneyed consideration, bonds under seal, and promissory notes, in absolute terms justify the admission of such evidence, on the principle that the consideration recited in the instrument is always subject to judicial inquiry. This court is unusually liberal in the application of the rule that permits such inquiry. In almost every reported case in which the controlling question was whether or not such parol evidence was admissible to show that some written instrument of indebtedness taken by a parent from a child was in fact a mere receipt or memorandum of an advancement, it is held that such evidence should be received. This case, however, differs from all the reported cases that have been cited, or that we have examined, in this respect. The parent that made the advancement is still alive, and is now insisting that the memorandum or receipt showing the amount of the advancement at the time it was made is both *prima facie* and conclusive evidence of a debt. We have already stated that an advancement is an irrevocable gift, and it has been repeatedly held that a donor cannot change an advancement into a debt or trust: *Haverstock v. Sarbach*, 1 Watts & S. 390; *Miller's Appeal*, 81 Pa. St. 337; *Sherwood v. Smith*, 23 Conn. 516; *Arnold v. Barrow*, 2 Pat. & H. 1; *Dudley v. Bosworth*, 10 Humph. 9; 51 Am. Dec. 690; *Thompson's Appeal*, 42 Pa. St. 345; *Cleaver v. Kirk*, 3 Met. (Ky.) 270.

Applying the principle that parol evidence is admissible to prove the intent of the parent to the facts developed on the trial, we have an abiding faith that there is not only some evidence to support the verdict of the jury, but that it was rendered in accordance with the preponderance of the evidence, and it therefore becomes our duty to recommend an affirmance of the judgment of the district court.

The COURT. It is so ordered.

PAROL EVIDENCE TO VARY OR EXPLAIN NOTES. — Parol evidence is admissible to show the want of consideration of a note: *Rice v. Howland*, 147

Mam. 407; *Monop v. Creditors*, 41 La. Ann. 296; or of a bill of exchange: *Ohleyer v. Bernheim*, 67 Miss. 76; or to show the real agreement entered into by and between the parties: *McAtter v. McAtter*, 31 S. C. 313; *Eastman v. Cleaver*, 72 Mich. 167. But, ordinarily, parol evidence of an antecedent or a contemporaneous parol agreement is inadmissible to vary or change the terms of a note: *Brown v. Nichols*, 123 Ind. 492; *Coopstick v. Bosworth*, 121 Ind. 6; *Clanin v. Easterly H. Mach. Co.*, 118 Ind. 372; *Farr v. Ricker*, 46 Ohio St. 265. Compare *Stanton v. New York etc. Ry Co.*, 59 Conn. 272, *ante*, p. 110, and note; *Gilbert v. Stockman*, 76 Wis. 62; 20 Am. St. Rep. 23, and note; *Kulenkamp v. Groff*, 71 Mich. 675; 15 Am. St. Rep. 283, and note 287, 288.

ADVANCEMENTS. — TO CREATE A VALID ADVANCEMENT, the gift must be expressed in writing as an advancement, or charged in writing by the intestate, or acknowledged in writing by the child or other descendant: *Willinson v. Thomas*, 123 Ill. 363. Where a testator bequeathed to R., a young man raised in his family, the sum of five hundred dollars, "in addition to what I have already given him," and at the date of the execution of the will the testator held against R. six notes, which were found among his assets, upon which the administrator brought suit, it was decided that the defendant was properly permitted to allege and prove by extrinsic evidence that he had been raised in the testator's family; that the testator, a man of means, had often expressed his intention to liberally provide for him; that prior to making his will, the testator had advanced money to defendant in anticipation of the promised testamentary provision, for which he took defendant's notes simply as a memorandum of the amount of money advanced; that no other property or money had ever been given to him by the testator; and that the words "in addition to what I have already given him," used in the will, referred to the money so advanced: *Daugherty v. Rogers*, 119 Ind. 255.

STATE v. BRADY.

[44 KANSAS, 435.]

LIBEL — CHARGING PERSON WITH BEING A RETURNED CONVICT. — A false publication in a newspaper, concerning a person, that he has been a convict in a state penitentiary, is libelous *per se*.

LIBEL — ANY PUBLICATION WHICH TENDS TO DEGRADE or injure another person, or to bring him in contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, or of any act odious and disgraceful to society, is libelous, unless the same is shown to be true.

CRIMINAL LIBEL OF FAMILY. — A false publication that a member of a particular family, by name, has been a state-prison convict, and directed against the whole family, is a criminal libel of the whole family of that name.

LIBEL — EXPRESS MALICE IS PRESUMED, AND NEED NOT BE PROVED, when the words published are libelous *per se*.

J. G. Mohler, for the appellant.

J. K. Owens, county attorney, *Miller and Ritchie*, and *D. H. Brown*, for the state.

GREEN, C. This case comes here on appeal from the district court of Morris County, where the defendant was prose-

cuted and convicted of criminal libel, for publishing in the Salina Daily Republican, of which he was the proprietor, at Salina, Kansas, on the twelfth day of November, 1889, the following statement: "Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary; the convict Harvey had been sent to Lansing from Salina."

The information charged that the libel was published of and concerning James M. Harvey, John A. Harvey, George E. Harvey, Z. T. Harvey, J. E. Harvey, and W. S. Harvey. The evidence showed that Dr. W. S. Harvey was a resident of Salina at the time of the publication, and a brother of ex-Governor James M. Harvey. The publication was admitted. The claim is made by the defendant that the language published was not libelous *per se*; that the court below erred in not giving the following instruction to the jury: "The publication charged as libelous in this case is not libelous *per se*; and before the jury can find the defendant guilty in this case, express malice must be proven."

This instruction was refused by the trial court, and the following given: "I instruct you, gentlemen of the jury, that to print and publish concerning any person that he has been a convict in the state penitentiary of the state of Kansas is libelous *per se*, unless the same is true; and in this connection, I further instruct you that there is no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that the same was published for justifiable ends."

1. The defendant insists that the above instruction given by the court was erroneous, as applied to this case, and greatly prejudiced the substantial rights of the defendant. This is the decisive and controlling question in this case. Ordinarily, the instructions to the jury should be considered together, and a judgment will not be reversed because some one of them fails to state the law applicable to the facts with sufficient qualifications, provided the defects be cured in other instructions: *Rice v. City of Des Moines*, 40 Iowa, 688; *State v. Maloy*, 44 Iowa, 104. In the eleventh instruction, which is complained of, the court said to the jury that to print and publish concerning any person that he had been a convict was libelous *per se*, unless the same was true. We see no error in this, taken in connection with the instructions as an entirety. Libel has been defined by Judge Story to be any publication the tendency of which is to degrade and injure another person.

or to bring him into contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, or of any act odious and disgraceful in society. *Dexter v. Spear*, 4 Mason, 115; *Newell on Defamation*, 37.

In this case the alleged libel charged that Governor Harvey had pardoned his own brother out of the penitentiary; that the convict Harvey had been sent to Lansing from Salina. This was certainly charging that one of the Harvey brothers had been convicted of a felony, and comes clearly within the definition of libel as defined by the crimes act: "A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends": *Gen. Stats.* 1889, par. 2444.

To call a person a returned convict, or otherwise to falsely impute that he has been tried and convicted of a criminal offense, is actionable: *Newell on Defamation*, 109; *Fowler v. Dowdney*, 2 Moody & R. 119; *Bell v. Byrne*, 13 East, 554.

We think the trial court committed no error in giving the eleventh instruction.

2. The appellant again contends that the statement published referred to no particular one of the Harvey family as having been a prison convict. While this objection might be urged with some force in a civil suit for damages, we do not think it is good in a criminal prosecution for libel. The law is elementary that a libel need not be on a particular person, but may be upon a family or a class of persons, if the tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace: *Rex v. Williams*, 5 Barn. & Ald. 595; *Rex v. Osborne*, 2 Barn. 138, 166; 2 Bishop's *Crim. Law*, 7th ed., sec. 934; 2 Starkie on Slander, 213; *Russell on Crimes*, 1st Am. ed., 305, 332.

A scandal published of three or four, or any one or two, persons is punishable at the complaint of one or more, or all, of them: *Holt on Libel*, 247. In *Palmer v. City of Concord*, 48 N. H. 211, 97 Am. Dec. 605, the supreme court said: "As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier

could have maintained a private action therefor; but the question whether the publication might not afford ground for a public prosecution is entirely different. Civil suits for libel are maintainable only on the ground that the plaintiff has individually suffered damage. Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libelous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual; and a doubt has been suggested whether the fact of numbers defamed does not add to the enormity of the act."

3. The defendant claims there was error in the court's refusing the fourth special instruction asked,—that before the jury could convict, express malice must be proven. We do not think this is the legal rule. In prosecutions for libel, malice is inferred from the nature of the charge; and when the publishing of words libelous *per se* is once proven, malice is inferred, as a person is presumed to have intended the consequences of his own acts. Chief Justice Shaw has clearly stated the rule: "It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will toward the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of matters; but if in pursuing that design he willfully inflicts a wrong on others which is not warranted by law, such act is malicious: *Newell on Defamation*, 317; *Commonwealth v. Snelling*, 15 Pick. 340; *Pledger v. State*, 77 Ga. 242.

The want of actual intent to vilify is no excuse for a libel; and if a man deems that to be right which the law pronounces wrong, the mistake does not free him from guilt: *Curtis v. Mussey*, 6 Gray, 261; 1 Bishop's *Crim. Law*, sec. 809; *Reynolds v. United States*, 98 U. S. 145.

Upon a careful examination of the errors complained of, we are satisfied that the court below committed no error, and recommend an affirmance of the judgment.

THE COURT. It is so ordered.

NEWSPAPER LIBEL. — For a full and complete discussion of the law pertaining to newspaper libel, see extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369.

LIBEL. — WHAT PUBLICATIONS ARE LIBELOUS *PER SE*: See *Morey v. Morn-*

ing *J. Ass'n*, 123 N. Y. 207; 20 Am. St. Rep. 730; *Riley v. Lee*, 88 Ky. 603; post, p. 358; *Smith v. Smith*, 73 Mich. 445; 16 Am. St. Rep. 594; *Cotulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 819; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338; 15 Am. St. Rep. 318; *Doan v. Kelley*, 121 Ind. 413; *Rosewater v. Hoffman*, 24 Neb. 222.

LIBEL — MALICE. — Malice, in a legal sense, means a wrong committed intentionally without just cause: *Bell v. Fernald*, 71 Mich. 267. And in slander malice is the gist of the action, the mere speaking of actionable words constituting malice: *Ritchie v. Stenius*, 73 Mich. 563. The law presumes malice from the publication of words libelous *per se*: *Bell v. Fernald*, 71 Mich. 267; but the occasion may rebut the presumption: *Christie v. Lynch*, 83 Va. 106; compare *Bradstreet v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768, and note; *Riley v. Lee*, 88 Ky. 603; post, p. 358.

HESS v. SPARKS.

[44 KANSAS, 465.]

SLANDER — WORDS ACTIONABLE PER SE. — The words, "What are you doing with that nine-dollar black-mailer here?" spoken of an employee to her employer by a stockholder and director in the company for whom she works, are not a privileged communication, but are slanderous, and actionable *per se*.

SLANDER — MEASURE OF DAMAGES. — Where the words spoken are slanderous *per se*, and are uttered maliciously, punitive as well as compensatory damages may be recovered.

SLANDER — PRIVILEGE OF COMMUNICATION MUST BE PLEADED. — In slander, the issue that the words spoken were a privileged communication is not raised by a general denial. Such privilege must be specially pleaded.

Peckham and Henderson, Pyburn and Love, and C. N. Sterry, for the plaintiff in error.

Hackney and Asp, for the defendant in error.

GREEN, C. This was an action for slander by the defendant in error against the plaintiff in error. Two causes of action were set out in the petition.

"1. That the defendant, on the first day of February, 1887, in the presence and hearing of divers persons, did falsely and maliciously speak and publish of and concerning the plaintiff the following false, malicious, and defamatory words, that is to say, 'What are you doing with that nine-dollar black-mailer here?' meaning thereby that the said plaintiff had committed the offense of extortion of money from a person or persons, by threats of accusation or exposure, or opposition in the public prints, and that she was a common black-mailer and extortioner;

"2. That on said first day of February, 1887, in the presence and hearing of divers persons, said defendant did falsely and maliciously speak and publish of and concerning the said plaintiff the following false, malicious, and defamatory words, to wit: 'She [meaning the plaintiff] tried to black-mail some one over at Dr. Sparks's'; meaning thereby that said plaintiff had tried to levy black-mail, or to extort money, from some person or persons at Dr. Sparks's, in said Arkansas City, by threats of accusation or exposure, or of opposition in the public prints, for the purpose of obtaining money thereby."

To this petition the defendant below interposed a general denial. A trial was had by the court and jury, and resulted in a verdict and judgment for the plaintiff below for thirteen hundred dollars. Plaintiff in error brings the case here for review, and his first contention is, that the petition did not state facts sufficient to constitute a cause of action, or that the matters charged in the petition were not actionable *per se*.

1. The evidence upon the trial showed that the plaintiff below was a young woman, engaged at the time the alleged slanderous words were charged to have been spoken in the Arkansas City cracker factory, making boxes and packing crackers, on a salary of nine dollars a week, and were addressed to the president of the cracker company. Did these words, spoken under the circumstances, charge the plaintiff below with the commission of such an offense as would occasion pecuniary damages to her?

"When language is used concerning a person or his affairs, which from its nature necessarily must, or presumably will, as its natural and proximate consequences occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong, without any allegation or evidence of damage, other than that which is implied, or presumed, from the fact of publication; and this is all that is meant by the term 'actionable *per se*,' " etc.: Newell on Defamation, 181.

Applying this rule to the case at bar, what is meant or understood by the word "black-mailer," or to charge one with being a black-mailer? — as that is the substance of the charge in this case.

The word "black-mail" has a well-defined meaning: the extortion of money from a person by threats of accusation, or exposure, or opposition in the public prints; hush-money,

bribe to keep silence; the extortion of hush-money, obtaining of value from a person as a condition of refraining from making an accusation against him or disclosing some secret calculated to operate to his prejudice. These definitions, given by the best lexicographers, convey to the mind what is intended to be understood by the use of the word. In speaking of the word "black-mail" and its understood meaning, Judge Monell says: "In common parlance and in general acceptance, it is equivalent to and synonymous with extortion; the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim. There is moral compulsion which neither necessity, nor fear, nor credulity can resist. It cannot be doubted, I think, that the term 'black-mailing' is invariably regarded as an unlawful act; and though, from its indefiniteness and comprehensiveness, the offense is not classified as a distinct crime, nevertheless it is believed to be criminal, and to charge a man with 'black-mailing' is equivalent to charging him with a crime": *Edsall v. Brooks*, 26 How. Pr. 426.

The doctrine of construction has been well stated by Mr. Starkie, in his treatise on slander, page 44: "Both judges and jurors shall understand words in that sense which the author intended to convey to the minds of the hearers, as evinced by the whole circumstances of the case. It is the province of the jury, where doubts arise, to decide whether the words were used maliciously and with a view to defame; such being matter of fact, to be collected from all concomitant circumstances; and for the court to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action."

Courts and juries will understand them in the same way that other people would: *Walton v. Singleton*, 7 Serg. & R. 451; 10 Am. Dec. 472.

Lord Mansfield remarked, in the case of *Peake v. Oldham*, 1 Cowp. 272, 273, "that where words, from their general import, appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them": *Goodrich v. Woolcott*, 3

Cow. 289; *Proctor v. Owens*, 18 Ind. 21; 81 Am. Dec. 341; *Edgar v. McOutchen*, 9 Mo. 759; *Ranger v. Goodrich*, 17 Wis. 80.

The charge alleged by the defendant in error against the plaintiff in error was, that she was a black-mailer; that is, that she was guilty of extortion, — illegal compulsion. This, the plaintiff below alleges, meant that she had committed the offense of extorting money from persons by threats of accusation or exposure, or opposition in the public prints, and that she was a common black-mailer and extortioner. This is the innuendo to explain what the plaintiff below claimed was meant by the use of the words, "What are you doing with that nine-dollar black-mailer here?"

The purpose and object of the innuendo is to make certain what might otherwise be uncertain. One of the means of insuring certainty in a petition for slander or libel is an innuendo: *Henicks v. Griffith*, 29 Kan. 516; *Townshend on Slander and Libel*, sec. 335; *Rodebaugh v. Hollingsworth*, 6 Ind. 339.

Now, taking the innuendo in connection with the words charged, we think the language imputed an offense which was punishable under the laws of this state, and the petition stated facts sufficient to constitute a cause of action; and the court committed no error in submitting the matter to the jury to determine whether it was so understood or not.

2. It is insisted that the words spoken were privileged. We do not think the plaintiff in error was in a position to claim that the words charged were privileged. Text-writers have enumerated four kinds or classes of privileged communications: 1. When the speaker of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in the prosecutions of his own rights or interests; 2. Anything said by a master concerning the character of a servant who has been in his employ; 3. Words used in legal proceedings; and 4. Words used in ordinary parliamentary proceedings. The very words charged — "What are you doing with that nine-dollar black-mailer here?" — would clearly indicate that the relation of master and servant did not exist, and that the communication was not privileged, and not made for honest motives.

3. The last error complained of is, that the court below instructed the jury that if they believed from the preponderance of the evidence that the words alleged to have been spoken were spoken, and spoken maliciously, by the defendant, that then they were authorized to assess punitive damages against

the defendant. We do not think the court erred in giving this instruction. If the words were spoken maliciously, the jury had the right to assess punitive as well as compensatory damages. The words charged and proven, in our judgment, were actionable *per se*; and it was the province of the jury to determine, in view of all the evidence, whether punitive damages should be allowed or not. The rule seems to be quite well settled that where the jury are satisfied by proper evidence that there was actual malice, they may allow punitive damages: *Klein v. Bauman*, 53 Wis. 244; *Bergmann v. Jones*, 94 N. Y. 51; *Wood v. Hilbish*, 23 Mo. App. 389; *Casey v. Hulan*, 118 Ind. 590.

We cannot say, from all the facts which surround this case, that the damages were excessive. It is the peculiar province of a jury, in cases of this kind, to consider the whole of the circumstances of the case, the occasion of the speaking of the slanderous words, the relationship between the parties, and the determination of the amount of the recovery, under proper instructions from the court; and unless there has been an abuse of these prerogatives, courts will not interfere.

We do not think this case presents such a state of facts as warrants an interposition.

We recommend an affirmance of the judgment of the court below.

The COURT. It is so ordered.

A motion for rehearing was made and disposed of by the following opinion:—

Per CURIAM. It is urged that the opinion handed down in this case wholly ignores the question whether the language spoken by defendant below was a privileged communication, or a qualified privileged communication. It is said that defendant below was one of the board of directors, and one of the largest stockholders of the company, and that the communication was made to the then secretary and treasurer of the company, in relation to an employee of the company.

The answer in this case was a general denial only. No facts in justification, or privilege, or qualified privilege, were alleged as new matter; therefore this question, so forcibly pressed upon the hearing of the motion for a new trial, was not before the trial court under the pleadings.

The demurrer to the evidence was properly sustained, and also the instruction prayed for properly refused, considering the pleadings and issues presented. Bliss on Code Pleading,

in section 363, says: "Facts in justification, either as showing the truth of the charge or that the publication was privileged, were always required to be specially pleaded. Facts in mitigation are just as essentially new matter; they disprove no fact which the plaintiff is bound to establish; they create issues upon which no evidence can be offered until raised by the defendant; they should then be set up in the answer."

The other facts presented are sufficiently disposed of in the former opinion.

The motion for a rehearing will be overruled.

SLANDER — WORDS ACTIONABLE PER SE. — Words are actionable in themselves, where an offense is imputed by them for which the party could be punished criminally, such as imputing the crime of adultery to a married woman: *Davis v. Sladden*, 17 Or. 259; or charging one with letting a house to fallen women for lewd purposes: *Halley v. Gregg*, 74 Iowa, 563; or charging a postmaster with unlawfully detaining, suppressing, or breaking open mail matter addressed to another: *Harris v. Terry*, 98 N. C. 131; or charging one with being a thief: *Wiest v. Luyendyk*, 73 Mich. 661; *Frolich v. McKiernan*, 84 Cal. 177; *Stumer v. Pitchman*, 124 Ill. 250; *Harrison v. Manship*, 120 Ind. 43; or charging one with forgery: *Benevise v. Thorp*, 77 Mich. 181. Words spoken injurious to one in his business, and false and malicious, are actionable as slanderous *per se*, and special damages need not be shown: *Haney Mfg. Co. v. Perkins*, 78 Mich. 1. Maliciously saying of another that he has contracted a loathsome disease is slanderous *per se*: *Monks v. Monks*, 118 Ind. 238. While the words "thief, rogue, and robber" are actionable *per se*, ordinarily, from the mere use of which the law will presume malice, the party using them may explain by showing that he did not intend to impute crime, and that the words were spoken in the heat of passion and under strong provocation: *Ritchie v. Stenius*, 73 Mich. 563. A want of chastity is not imputed by the words, "I know all about that case; while she was out there claiming to be the wife of F., she was back here claiming to be my wife": *Funk v. Beverly*, 112 Ind. 190. But where slanderous words are spoken, which by the proper inducement and innuendo may be shown to have been spoken with the intent to charge a female with unchastity, they are actionable just as if the specific charge of unchastity had itself been made: *Freeman v. Sanderson*, 123 Ind. 265; *Wilcox v. Moore*, 61 Vt. 484. See note to *Coburn v. Harwood*, 12 Am. Dec. 39-46, for a classification of slanderous words actionable *per se*: *St. Martin v. Demoyer*, 1 Minn. 156; 61 Am. Dec. 494, and note; *K — v. H —*, 20 Wis. 239; 91 Am. Dec. 397, and note 402, 403.

SLANDER — DAMAGES RECOVERABLE. — In slander, the awarding of exemplary damages is entirely within the discretion of the jury: *Wimer v. Albaugh*, 78 Iowa, 79; 16 Am. St. Rep. 422. Where actual malice is proved, the jury may allow exemplary damages: *Newman v. Stein*, 75 Mich. 402; 13 Am. St. Rep. 447, and note; *Reeves v. Winn*, 97 N. C. 246; 2 Am. St. Rep. 287, and note; *Wabash etc. Co. v. Crumrine*, 123 Ind. 89. In estimating the exemplary damages to be awarded in an action for malicious slander, they may consider the plaintiff's counsel fees in the case: *Wynne v. Parsons*, 57 Conn. 73. And in estimating the amount of damages, even in a state where exemplary damages are not recoverable, the jury may take into consideration the defendant's pecuniary circumstances: *Rosewater v. Hoffman*, 24 Neb. 222.

STATE v. CREDITOR.

(44 KANSAS, 665.)

CONSTITUTIONAL LAW — VALIDITY OF STATUTE REGULATING PRACTICE OF DENTISTRY. — The legislature may by statute regulate the practice of dentistry within the state, and may provide that only those possessing skill and learned in that profession shall be permitted to practice. It may prescribe the nature and extent of the qualifications required and the rules for ascertaining and determining whether those proposing to practice come up to the statutory standard. If the statute operates equally upon all who may desire to practice, and is enacted to promote the health and welfare of the people by excluding those who are ignorant and incapable, then the fact that the conditions may be rigorous, impolitic, and unjust will not render the statute invalid. Such legislation is not repugnant to section 2 of article 4 of the United States constitution, nor in conflict with section 1 of the fourteenth amendment thereto.

CONSTITUTIONAL LAW — VALIDITY OF STATUTE REGULATING PRACTICE OF DENTISTRY. — A statute regulating the practice of dentistry, and prescribing the nature and extent of the qualifications required, and the rules for ascertaining and determining whether those proposing to practice come up to the statutory requirement, cannot be deemed to unduly discriminate between persons or classes, or to be unconstitutional because it exempts those engaged in the practice of dentistry within the state at the time of its enactment from the necessity of obtaining a diploma from a dental college, and requires such a diploma from all others. Although this fact may work a hardship upon a practicing dentist who comes into the state after the enactment of the statute, it does not render the law invalid.

Dale and Wall, for the appellant.

L. B. Kellogg, attorney-general, for the state. -

JOHNSTON, J. E. H. Creditor was convicted in the district court of Sedgwick County for practicing dental surgery without authority, and in violation of the provisions of chapter 123 of the Laws of 1885, entitled "An act to regulate the practice of dentistry, and punish violators thereof." He appeals, and challenges the validity of the statute. The act provides that it shall be unlawful for any person to practice dentistry or dental surgery without having a diploma from some reputable dental college, school, or university department in which there was, at the time the diploma was issued, annually delivered a full course of lectures and instruction in dentistry or dental surgery. It enacts that the requirement of a diploma shall not apply to those engaged in the practice of dentistry or dental surgery within the state at the time of the passage of the act. A board of examiners is created, who are granted authority to issue certificates to persons engaged

in the practice of dentistry at the time of the passage of the act, and to decide upon the validity of such diplomas as may be presented for registration. All persons engaged in the practice of dentistry within the state at the time of the passage of the act are required to register their names and place of business with the board of examiners within six months, and when that is done the board is authorized to issue to such persons certificates authorizing them to continue the practice. All persons desiring to begin the practice after the passage of the act are required to present to the board of examiners a diploma or a duly authenticated copy of the same, which, if found by the board to be valid, is accepted, and the person holding the diploma is granted a certificate authorizing him to practice. A charge of three dollars is made for the certificates issued to persons practicing in the state at the time the act is passed, and for the certificates issued to persons commencing to practice after the passage of the act, a charge of ten dollars is imposed. It is finally provided that any person who engages in the practice of dentistry in violation of the provisions of the act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than ten nor more than one hundred dollars.

The appellant contends that the act is repugnant to section 2 of article 4 of the federal constitution, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and is also in conflict with section 1 of the fourteenth amendment of the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The power of the legislature to regulate the practice of medicine, dentistry, or surgery is undoubted; it is an exercise of the police power of the state for the protection of the health and the promotion of the comfort and welfare of the people. It may provide that only those possessing skill and learned in these professions shall be permitted to practice; may prescribe the nature and extent of the qualifications required, and the rules for ascertaining and determining whether those proposing to practice come up to the statutory standard. If the regulations and conditions are adopted in good faith, and they operate equally upon all who may desire to practice, and who possess the required qualifications, and if they are adapted to the legislative purpose of promoting the health and welfare of the people by

excluding from the practice those who are ignorant and incapable, then the fact that the conditions may be rigorous, impolitic, and unjust will not render the legislation invalid. The authorities uniformly support the exercise of this power by the state, and statutes similar to the one under consideration have been repeatedly sustained: *Dent v. West Virginia*, 129 U. S. 114; *State v. Vanderluis*, 42 Minn. 129; *Hewitt v. Charier*, 16 Pick. 353; *Eastman v. State*, 109 Ind. 278; 58 Am. Rep. 400; *People v. Phippin*, 70 Mich. 6; *Richardson v. State*, 47 Ark. 562; *Ex parte Spinney*, 10 Nev. 323; *Harding v. People*, 10 Col. 387; *Antle v. State*, 6 Tex. App. 202; *Musser v. Chase*, 29 Ohio St. 577; *Thompson v. Hazen*, 25 Me. 104; *Stats v. Gregory*, 83 Mo. 123; 53 Am. Rep. 565; *State v. Medical Ex. Board*, 32 Minn. 324.

Although not specifically declared in the act, the manifest purpose of the legislature was to exclude from a profession requiring learning, skill, and experience those who are unfit to practice, and thus protect the public from ignorance and incompetency. No arbitrary or capricious conditions are imposed. The profession and practice are open to every citizen of the United States who is qualified, and who can produce evidence of the same. The legislature saw fit to permit those practicing in the state when the act was passed to continue to practice without diploma or other evidence of competency. It may be, as contended, that the fact of being in the practice is not the best test or evidence of skill and capability; but the courts have nothing to do with the expediency or wisdom of the standard of qualification fixed, nor with the tests adopted for ascertaining the same. The legislature proceeded upon the theory that the fact that they had been engaged in the practice within the state was sufficient evidence of their proficiency in the profession. This fact is made by the legislature an evidence of skill and competency equivalent to a diploma from a dental college; and the wisdom of either test is a question for the legislature, and not for the courts. The act cannot be held to unduly discriminate between persons or classes, and unconstitutional because it exempts those engaged in the practice within the state when the law was enacted from the necessity of obtaining a diploma: *Fox v. Territory*, 2 Wash. 297; *Ex parte Spinney*, 10 Nev. 323; *People v. Phippin*, 70 Mich. 6; *State v. Vanderluis*, 42 Minn. 129. All who enter the profession after the passage of the law are subject to the same conditions. No distinctions are made

between citizens of this and other states. There is no discrimination between graduates from dental colleges in Kansas and those graduated from colleges located in other states or in foreign countries. No higher qualification is required, nor any different test of competency prescribed, nor any higher charge for a certificate imposed on the appellant, who came into the state after the law was enacted, than was required of or imposed on one who resided in Kansas at that time, but was not engaged in the practice of dentistry. It may be unfortunate for the appellant that he had not begun the practice in the state when the law was enacted, and thus have had that evidence of qualification essential to the obtaining of a certificate without a diploma; but when no more is required of him than is required of all other citizens of the United States proposing to begin the practice within this state, he has no cause to complain. A charge of three dollars is made for a certificate issued to those who were practitioners when the law was passed; and while a charge of ten dollars is made for a certificate to those who are not engaged in the practice, and who presented diplomas as evidence of their fitness, the charges are trifling, and in each case it is probably commensurate with the trouble and expense of attending the examination and the granting of the certificate. Those who were practicing when the law was passed obtained a certificate upon the mere registration of their names in a book provided by the board of examiners; but in the other cases, the board is required to examine the validity of the diplomas offered as evidence of the qualification of the applicant, and the increased charge for a certificate in such case probably corresponds with the increased trouble and expense in making the inquiry. The difference in the charge is not an undue discrimination, and is not invalid, for the same reason that the exemption of those engaged in the practice from the requirement of the diploma does not render the act invalid.

The cited case of *State v. Hinman*, Sup. Ct. N. H., July 28, 1889, is not an authority against the validity of our statute. The New Hampshire statute which was there held to be invalid was an act regulating the practice of dentistry. It required a dentist practicing in one part of the state to undergo an examination and to pay a certain license-fee, while dentists residing elsewhere in the state were exempted from these requirements. There was a discrimination between persons

residing and practicing in the state, founded solely upon the accidental circumstance of residence, or a change of residence, and for that reason the statute was held to be unconstitutional and void. No such discrimination is found in our statute, and we do not think that it is repugnant to the federal constitution upon either of the grounds relied upon, and therefore the conviction of the defendant must stand.

Judgment affirmed.

DENTISTRY — CONSTITUTIONALITY OF STATUTE. — The Arkansas statute providing that every one engaged in dentistry at the date of its enactment shall cause his name to be registered with the board of examiners, making it a misdemeanor for any one to practice as a dentist after the expiration of three months from the passage of the act unless he possesses a certificate from such board of examiners, is not unconstitutional as depriving a citizen of the right to follow a lawful vocation: *Goenell v. State*, 52 Ark. 228.

GARDOM v. WOODWARD.

[44 KANSAS, 758.]

FRAUDULENT CONVEYANCES — EVIDENCE OF INTENT. — Where a sale of personal property is attacked as having been made with intent to hinder, delay, and defraud creditors, the seller may testify as to whether or not such was his intent in making the sale.

J. K. Owens and John T. Bradley, for the plaintiffs in error.

J. Jay Buck and E. S. Bertram, for the defendants in error.

VALENTINE, J. This was an action brought in the district court of Morris County, on February 17, 1888, by B. W. Woodward, F. A. Faxon, and J. C. Horton, partners, doing business under the firm name of Woodward, Faxon, & Co., against F. A. Gardom, to recover the sum of \$794.25, on an account. At the same time an order of attachment was procured in the case upon the following grounds, as alleged in plaintiffs' affidavit therefor, to wit: "That said defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors, and has property and rights in action which he conceals; has assigned, and is about to dispose of his property, or a part thereof, with the intent to defraud, hinder, and delay his creditors."

The order of attachment was levied upon certain personal property as the property of Gardom, valued by the appraisers at \$1,650.86. On April 9, 1888, Gardom filed a motion to

discharge the attachment, upon the ground, among others, that the grounds set forth in the plaintiffs' affidavit for the attachment were not true. On the same day, John A. McQuistan, with leave of the court and under the provisions of chapter 137 of the Laws of 1877 (Gen. Stats. 1889, par. 4123), filed an interplea claiming that the personal property attached belonged to him. The plaintiffs replied to this interplea. On April 23, 1888, by consent of the parties and the court, a trial was had before the court without a jury upon both the motion and the interplea upon the same evidence. The decision of the court below was in favor of the plaintiffs and against Gardom and McQuistan, and they, as plaintiffs in error, bring the case to this court for review.

It appears that the attached property once belonged to the defendant Gardom, but that prior to the levying of the attachment, and on January, 5, 1888, McQuistan purchased the same from Gardom for the sum of \$1,234.45, that amount being the amount of a promissory note, with interest, which McQuistan at the time held against Gardom. The plaintiffs claim that this sale was a sham, made for the purpose of hindering, delaying, and defrauding the creditors of Gardom; but Gardom and McQuistan claim that the sale was made in the best of faith. Whether the sale was a sham or not, or whether it was made in good faith, was about the only material question presented to the court below for its determination. If it was a sham sale, then, as to the plaintiffs, the property belonged to Gardom, and the plaintiffs were entitled to their attachment; but if it was an honest and *bona fide* sale, then the property belonged to McQuistan, and the plaintiffs were not entitled to their attachment. During the trial the defendant Gardom was examined as a witness on the part of himself and McQuistan, and he was asked the following, among other questions: "I wish to ask you about these matters. There are three charges against you; one is, that you were about to convert your property, or a part thereof, into money, for the purpose of placing it beyond the reach of your creditors. I wish you to state to the court whether or not you were about, at the time of the attachment, — at, or before, or about that time, — if you were about to convert your property, or a part thereof, into money, for the purpose of placing it beyond the reach of your creditors?"

The plaintiffs objected to the question, upon the ground that it was "incompetent, irrelevant, and immaterial, and called

for a legal conclusion"; and the court below sustained the objection, to which Gardom and McQuistan excepted. The witness was also asked the following question, to wit: "He charges you with having assigned your property, or a part hereof, with the intent to hinder, defraud, and delay your creditors. Is that true? Did you have any such intent?"

To which the plaintiffs objected, as "incompetent, and as involving a question of law," which objection was sustained by the court, and the ruling duly excepted to.

It will be perceived that these questions were not objected to on the ground of their form, or that they were leading, but upon the grounds, in substance, that the evidence to be elicited by them would be incompetent, irrelevant, and immaterial, a legal conclusion and a question of law. We think the court below committed error. A vital question involved in the case was, whether the aforesaid sale was made in good faith, or was a mere sham, and made for the purpose of hindering, delaying, and defrauding Gardom's creditors. Whether the sale was in good faith or not depended upon the state or condition of Gardom's and McQuistan's minds, their thoughts, intentions, motives; and the aforesaid questions were asked for the purpose of eliciting evidence tending to show what the condition of Gardom's mind, in particular, was, — his intentions and motives. Dr. Wharton, in his work on the law of evidence, section 508, uses the following language: "A witness, also, is not to be permitted to testify as to the motives by which another person is or has been actuated. Motives are eminently inferences from conduct. The facts from which the inferences are to be drawn are to be detailed by the witnesses; for the jury the work of inference is to be reserved. Yet where a party is examined as to his own conduct, he may be asked as to his motives, his testimony to such motive being based, not on inference, but on consciousness." See also Wharton on Evidence, secs. 482, 955.

In an article in the Albany Law Journal of December, 1876, the following, among other language, is used: "Upon the review of all the cases, it would appear that in cases arising under a statute, where the statute makes the intent of the one doing an act involved in the issue essential, it is competent to inquire of him as a witness, what his intent was, and his testimony goes to the jury with the other evidence contradicting or corroborating it": 14 Alb. L. J. 387.

In the case of *Commonwealth v. Woodward*, 102 Mass. 155,

161, the following language is used: "The criminal purpose or intent must always be proved. It is usually inferred from the character and circumstances of the offense, or proved by preceding threats, accompanying declarations, or subsequent conduct or admissions. Now that the defendant himself is admitted as a witness, it must be competent for him to testify directly to that which is always a subject of proof or disproof by indirect evidence."

In the case of *Seymour v. Wilson*, 14 N. Y. 567, the following is decided: "On an issue of fact as to whether an assignment or transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor is a witness, to inquire of him whether, in making the assignment or transfer, he intended to delay or defraud his creditors." See also the following additional authorities: *Wheelden v. Wilson*, 44 Me. 11; *Snow v. Paine*, 114 Mass. 520; *Fisk v. Inhabitants of Chester*, 8 Gray, 506; *Lombard v. Oliver*, 7 Allen, 155; *Perse v. Willett*, 1 Rob. (N. Y.) 131; *Mathews v. Poultney*, 33 Barb. 127; *Pope v. Hart*, 35 Barb. 630; *Bedell v. Chase*, 84 N. Y. 386; *Thurston v. Cornell*, 38 N. Y. 281, 287. and cases there cited; *Thorne v. Helmer*, 2 Keyes, 27; *Courtland Co. v. Herkimer Co.*, 44 N. Y. 22; *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158; *People v. Pease*, 27 N. Y. 45; *Norris v. Morrill*, 40 N. H. 395; *Hale v. Taylor*, 45 N. H. 405; *Delano v. Goodwin*, 48 N. H. 203; 98 Am. Dec. 601.

The condition of a man's mind with reference to what he thinks, feels, believes, intends, and his motives, is always a fact, and it is a fact which is often required to be ascertained both in civil and in criminal cases; and only one person in the world has any actual knowledge concerning that fact, and that person is the one whose condition of mind is in question; and where he is a competent witness to prove such condition, he may testify to the same directly. Other witnesses can testify only to extraneous facts tending to prove this condition. He may also testify to such extraneous facts, but he may testify directly as to what the condition of his own mind is or was at any particular time or on any particular occasion. The court below held otherwise. The court below held that such direct testimony of the witness himself as to the condition of his own mind was worthless. If this testimony of the witness had been admitted, the finding of the court below might perhaps have been different from what it was. Indeed,

it is probable that the finding of the court below without this testimony is erroneous, at least as to McQuistan.

The order and judgment of the court below will be reversed, and the cause remanded for further proceedings.

RIGHT OF PARTY TO TESTIFY TO HIS BELIEF, MOTIVE, OR INTENT. — The rule is well settled and supported by the weight of modern authority that whenever the motive, belief, or intention of any person is a material fact to be proved under the issue on trial, it is competent to prove it by the direct testimony of such person, whether he is a party to the suit or not. The rule as thus stated is applicable alike to civil, quasi criminal, and criminal cases: *Watson v. Cheshire*, 18 Iowa, 202; 87 Am. Dec. 382; *Berkey v. Judd*, 22 Minn. 287; *Anderson v. Wehe*, 62 Wis. 401; *Germania Fire Ins. Co. v. Stone*, 21 Fla. 555; *Snow v. Paine*, 114 Mass. 520; *Thurston v. Cornell*, 38 N. Y. 281; *Over v. Schiffing*, 102 Ind. 191; *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158; *Rollis v. Finnegan*, 43 Md. 490; *Superintendent etc. v. Superintendent etc.*, 44 N. Y. 22; *Norris v. Morrill*, 40 N. H. 395; *Wheelden v. Wilson*, 44 Me. 11. "Before the statute making parties competent witnesses, the ordinary way to prove their intent or understanding was by circumstantial evidence. But now that the party himself is admitted to testify, there is no reason for confining his testimony to a variety of circumstances tending to show his purpose or understanding, when he knows and can testify directly what that purpose or understanding was. Accordingly, it has been held that where the intention or good faith of a party to a suit becomes material, it may be shown directly, as well as from circumstances; and the party himself, if a competent witness, may testify directly to his intention or understanding, unless prevented by some other principle of law applicable to the particular case"; *Delano v. Goodwin*, 48 N. H. 203; 97 Am. Dec. 601; citing *Hall v. Taylor*, 45 N. H. 405; *Fisk v. Chester*, 8 Gray, 506; *Thacher v. Flinnery*, 7 Allen, 146; *Lombard v. Oliver*, 7 Allen, 155.

In *Watson v. Cheshire*, 18 Iowa, 212, 87 Am. Dec. 382, the court said: "The error assigned is, that it is not permissible to allow a witness to testify as to his belief, especially in reference to a question upon which, in a case of fraud, the whole cause usually turns. We admit that it is going a great way to allow this to be done, especially where the witness is a party to the suit, testifying at his own instance and in his own behalf. Yet the authorities do hold that when the knowledge, belief, or intention of the witness is a material fact, it may be testified to the jury, the same as any other fact; giving to the opposite party a liberal scope in the cross-examination"; citing, in addition to the cases mentioned *supra*, *Seymour v. Wilson*, 14 N. Y. 567. To the same effect is *Berkey v. Judd*, 22 Minn. 287.

The evidence of a witness as to his intent, motive, or belief, though admissible, is never conclusive in the face of other facts and circumstances. Thus the court in *Anderson v. Wehe*, 62 Wis. 402, said: "It is true that this court, as well as many other courts, holds that, upon a question of intent with which an act was done, the party doing the act may testify directly; but it has never been held that such direct negative testimony must necessarily outweigh the evidence of facts and circumstances tending to prove such intent." In the application of the rule in the trial of an accusation of an assault with intent to commit a rape, the court, through Sanderson, J., in *People v. Farrell*, 31 Cal. 576-583, said: "The court also erred in not allowing the defendant to testify fully as to what he said in the conversation with

Sexton, and to explain his meaning to the jury. The rule that the intent must be inferred from the acts and words of the party had its foundation in necessity created by the rule which excluded parties in interest from the witness-stand. That necessity is now removed by the abrogation of the rule which created it, and the legal tenet that actions must speak for themselves, and words furnish their own interpretation, is much modified, if not wholly abrogated, by the recent innovation upon the common law by which parties are allowed to testify in their own behalf. Before that time, there was no way of ascertaining the motives and intentions of parties except by inference from their acts and sayings, and all experience shows that they may frequently, if not at all times, prove very imperfect guides. The object of the recent changes, as we conceive, was, not merely to enable parties to disclose facts wholly within their own knowledge, but to do, in addition, what theretofore had been impossible, — explain their acts and the motives with which they were performed, and to explain, if need be, what they meant or intended to be understood as meaning by what they may have said in regard to any material fact. It is presumed that there are but few members of the legal profession who have not, at one time or another, felt the harshness, if not the injustice, of the rule which excluded parties from the witness-stand, and closed the door to explanations which otherwise could have been made, and would have given a very different color to the transaction. Actions and words are liable to misconstruction, as all human experience proves. Actions apparently suspicious become innocent, when the motive with which they were performed is understood. Words are of a very different import when spoken in earnest and when spoken in jest, when imperfectly understood and when fully explained. If, under the new rule, parties are to be kept in harness, and not allowed to explain their actions and words, when they admit of explanation, and when explanation is needed in order to exhibit the whole truth, but half the evil which was felt under the old rule has been removed. It is no answer to say that this enables a party to substitute a false motive for the true one, or to convert words spoken in one sense into another. If the argument proves anything, it proves too much, and shows that the radical change which has been made is, in all respects, founded in folly, rather than wisdom. For the truthfulness of parties when upon the witness-stand we must depend, as in the case of other witnesses, upon the obligations of their oath, and their reputation for truth and veracity. If these can be relied upon for the truth of statements made in reference to acts and words of which the eye and ear may take notice, they may, for the same reason, be accepted as guaranties for the truth of statements made in respect to motives and intents of which the mind or inner man alone can take cognizance. Nor is there, in our judgment, any well-grounded reason for apprehending that this rule will obstruct, rather than advance, the ends of justice. There is no more danger of imposing upon the jury falsehood or pretense, in respect to motives and intents, than there is of doing the like in respect to visible or external circumstances. The jury can as readily distinguish between the false and true in respect to the former as the latter. If the motive or intent assigned is inconsistent with the external circumstances, it must be discarded as false. If, on the contrary, they are consistent, there is no reason why they may not be true. As to the policy of the change which has been made, it may be too soon to speak. That in a search for truth, whether in the course of judicial proceedings or in the prosecution of any other science, no source of information should be closed, cannot be denied, on the score of theory at least. But what will be the

practical workings of a given rule, whether it will embarrass or advance the ends intended to be subserved, can be tested only by experience. The law, like every other science, is progressive, and it is not to be presumed that its administration has yet reached its highest perfection. In civil cases, the testimony of parties in interest has always been resorted to, more or less, in one form or another. . . . There is no reason why the rules of evidence in criminal cases should differ from those in civil cases. On the contrary, what works well in the latter cases ought, for the same reason, to work well in the former. The late change is but an extension of a principle which has been found to work well, so far as previously applied. Let it have a fair trial in the new field. If it works well, a further step in the right direction will have been taken; and if not, the step can be readily retraced."

The rule above considered has been applied to various classes of cases, and under numerous different circumstances; as, for instance, in actions for malicious prosecution it is competent to ask the defendant, he being a witness in his own behalf, if at the time he instituted the prosecution complained of he believed that the claim upon which the same was founded was a valid and legal claim against the person prosecuted: *Garrett v. Manheimer*, 24 Minn. 193; and he may also be allowed to testify that he acted in good faith, and had no malice or ill-feeling against the plaintiff: *Vansickle v. Brown*, 68 Mo. 627; and he may further testify as to his motive in instituting the prosecution complained of: *Heap v. Parrish*, 104 Ind. 36; or in such action the defendant may testify that when he made complaint against the plaintiff for perjury he believed him to be guilty of the charge made against him: *McKown v. Hunter*, 30 N. Y. 625.

On the issue of fact as to whether or not an assignment, transfer, or sale of property was made to hinder, delay, or defraud creditors, it is competent, when the assignor or seller is a witness, to inquire of him whether or not, in making the sale, assignment, or transfer, he intended to delay or defraud his creditors: *Seymour v. Wilson*, 14 N. Y. 567; *Germania Fire Ins. Co. v. Stone*, 21 Fla. 555; *Sedgwick v. Tucker*, 90 Ind. 271; *Snow v. Paine*, 114 Mass. 520; *Manufacturers' etc. Bank v. Koch*, 105 N. Y. 630; *Miner v. Phillips*, 42 Ill. 123; *Shockey v. Milla*, 71 Ind. 288; 36 Am. Rep. 196. The rule is thus laid down in *Watkins v. Wallace*, 19 Mich. 56, 75: "It is alleged as error that the court allowed the assignor to answer what his intentions were in making the assignment. The main inquiry in the case was concerning this intention. Intention is generally proved by circumstances, because usually there is no other mode of proof. But when the only person who knows the fact is accessible as a witness, his answer must necessarily be more direct evidence than any other; and if there is any reason to suspect his candor, the jury can make all the allowances called for by his position and demeanor. The evidence was admissible."

When the good faith of a purchase is sought to be impeached as against creditors, the purchaser may be examined as to the intention with which it was made: *Bedell v. Chase*, 34 N. Y. 386.

A party charged with having obtained a contract by means of misrepresentations may testify that he acted in good faith in making them: *Phelps v. George's Creek etc. Co.*, 60 Md. 536. Again, where a mortgage is assailed on the ground that it was made to hinder, delay, and defraud the creditors of the mortgagor, the mortgagee may testify as to the motive which induced him to take the mortgage: *Wheelden v. Wilson*, 44 Me. 11. In a case where a note was attacked for usury, the court said: "We have seen that the whole case was resolved into a question of fact for the jury; viz., What was the inten-

tion of the plaintiff in reserving this sum of \$21.50? Not, it must be observed, whether she intended to take usury; for the law defines what usury is, and whether it be taken intentionally or ignorantly is immaterial. But whether it was intended as compensation for the loan, or as compensation for trouble and expense incurred in collecting the money to be loaned, was precisely the question of fact for the jury; and the law is now well settled, under the rule admitting parties to testify in their own behalf, that where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was": *Thurston v. Cornell*, 38 N. Y. 281-287.

On the question as to whether or not a deed was signed by a grantor with knowledge of its contents, his testimony that he never intended to convey his land to the grantees named in the deed is admissible. So a party to a deed may testify that he executed it in good faith, when its validity is in issue: *Thacher v. Phinney*, 7 Allen, 146; *Perry v. Porter*, 121 Mass. 522.

On an issue as to whether or not land has been dedicated to a public use, the intention to dedicate or not to dedicate, on the part of the owner of the land, is a prime element in determining whether there has been a dedication in fact, and such owner may testify as to what his intention really was: *Bidinger v. Bishop*, 76 Ind. 244.

Where the validity of a chattel mortgage is assailed on the ground of fraud, the mortgagee may testify that he did not know that it was made by the mortgagor with intent to defraud his creditors, and that he himself had no such motive in taking it: *Frost v. Rosecrans*, 66 Iowa, 406. One may testify to his intent in making a certain payment: *Stearns v. Goselin*, 58 Vt. 194.

On the trial of an action against the superintendent of the poor, to recover for the maintenance of a pauper alleged to have been improperly removed from the county, with intent that he should become chargeable to another county, the superintendent may testify as to the intent with which he removed such pauper: *Superintendent etc. v. Superintendent etc.*, 44 N. Y. 22. Whenever the question of intent is material in determining the question of domicile or residence, as for voting or other purposes, the party in interest may testify as to the intent with which he removed from one place to another: *Lombard v. Oliver*, 7 Allen, 155; *Fisk v. Inhabitants of Chester*, 8 Gray, 506; *Kennedy v. Ryall*, 67 N. Y. 879.

An exception to the rule above considered is found in the fact that a party to a written contract cannot testify to thoughts and purposes, intent or motives, on his part, undisclosed at the time of making the contract, for the purpose of affecting its legal import: *Oake v. Pottsville Bank*, 116 Pa. St. 264; *Spencer v. Oak*, 89 Pa. St. 314; *Browne v. Hickie*, 68 Iowa, 330; *Dillon v. Anderson*, 43 N. Y. 231; *Quimby v. Morrill*, 47 Me. 470; *Thomas v. Loose*, 114 Pa. St. 35. "When a party is charged with the commission of an act with a particular intent, he may testify what that intention was; but he cannot testify to the undisclosed purpose of his mind, or declare a mental reservation, to nullify the express words of his contract": *Oake v. Pottsville Bank*, 116 Pa. St. 270. The court, in applying the exception mentioned in *Dillon v. Anderson*, 43 N. Y. 231, said, in relation to the application and restrictions upon the main rule, that "there are authorities that a witness may be asked his motive or intent in doing an act. We think that they hold no more than this: that where the doing of the act is not disputed, but is affirmed, and whether the act shall be held valid or invalid hangs upon the intent with which it is done, which intent, from its nature, would be formed and held without avowal, there he upon whom the intent is charged may

testify whether he secretly held such intent when he did the act; . . . but that an act should be held to have or not to have effect, and one party to it to be bound or not as the other party to it should, by his undisclosed purpose, have determined, is warranted by no sound principle."

In the trial of criminal cases it is a general rule that where the intent is an essential element to constitute the crime for which the prisoner is on trial, he has the right to testify as to his intent in doing any act which is claimed to prove criminal intent: *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158; *People v. Farrell*, 31 Cal. 576; *Ross v. State*, 116 Ind. 495. In the last case the court said: "Before defendants in criminal cases were permitted to testify in their own behalf, there was no means of ascertaining the intent with which they did any particular act, except as it could be inferred from the facts and circumstances attending it. The intent, however, was always a fact necessary to be established, where it constituted an essential element in the crime charged. Now that defendants are permitted to testify in their own behalf, there can be no valid reason assigned why they should not be allowed to testify to the intent with which any act was done, where such intent is a fact necessary to be ascertained." The rule has been applied on the trial of an indictment for assault and battery with intent to commit a felony, where the defendant was allowed to testify as to what was his intention in committing the assault: *Greer v. State*, 53 Ind. 420.

In the trial of an indictment for larceny, the defendant may testify as to what his intention was at the time that the goods came into his possession, in regard to converting them to his own use: *White v. State*, 53 Ind. 595, in which the court said: "In a criminal case, the intent is a fact known to and peculiarly within the knowledge of the defendant, and we see no well-founded reason why he may not testify concerning it, as he might to any other fact of which he has knowledge. Because the intent is a fact which cannot, in the nature of things, be positively known to others, and is hence a matter about which other witnesses cannot directly testify, does not, in our opinion, affect the rule above laid down as to the competency of the defendant in that respect."

In trespass *quare clausum*, where the malice of the defendant may be ground for exemplary damages, he, being a competent witness, may testify what his motive and purpose were in doing the acts complained of: *Norris v. Morrill*, 40 N. H. 395.

On the trial of a charge of obtaining goods or property by means of false pretenses, with intent to defraud, the defendant may testify as to the intent with which he received the goods or property: *People v. Baker*, 96 N. Y. 340; *Over v. Shiffing*, 102 Ind. 191.

On a trial for manslaughter, ensuing from a blow which defendant seeks to justify as self-defense, his testimony that he only intended to hit the shoulder, and not the head, of the deceased, is competent on the ground of justification, though incompetent as to his implied intent to kill by the blow: *Commonwealth v. Woodward*, 102 Mass. 155. "A person on trial for assault with intent to murder is competent as to the purpose for which he procured the instrument with which he committed the assault." To the same effect, *Kerrains v. People*, 60 N. Y. 221; 19 Am. Rep. 158; *Fennick v. State*, 63 Md. 239.

A defendant charged with murder may testify whether, at the time he discharged his pistol at the deceased, he did or did not believe that his life was in danger, or that he might receive great bodily harm, to show the con-

dition of his mind, and to establish justification: *State v. Harrington*, 12 Nev. 126.

The only states in which a contrary rule to that enunciated in the majority of the cases mentioned above is held to prevail, so far as we have been able to learn, are Alabama and Ohio. In the former state, the doctrine is well settled that the motive or intent with which an act is done or refused to be done is an inferential fact, to which a witness cannot testify for want of the requisite knowledge; and the principle of the common law is extended to a party testifying as a witness for himself, because such evidence is not susceptible of contradiction: *Alabama etc. Co. v. Reynolds*, 19 Ala. 497; *McCormick v. Joseph*, 77 Ala. 236; *Whisenant v. State*, 71 Ala. 383; *Burke v. State*, 71 Ala. 377; *Wheless v. Rhodes*, 70 Ala. 419. The rule is there applied to civil and criminal cases alike, although the fact is recognized that a different doctrine prevails in nearly all of the remaining states of the Union.

So in Ohio, a person on trial for assault with intent to murder cannot testify as to the intent with which he made the assault, at least without showing that it was thereby intended to disprove the felonious intent charged: *Bolen v. State*, 26 Ohio St. 371. And a witness cannot testify as to what he intended, or his motive in asking questions of another, in a conversation which he is narrating. His meaning must be gathered from the import of the language, without the aid of a subsequent explanation of his own language: *Haywood v. Foster*, 16 Ohio, 88.

A witness can never testify directly to the motives or intentions of another party; he can only testify to acts and declarations of such party, showing his motive or intention: *Olsh v. Klehr*, 117 Ill. 643; *Manufacturers' etc. Bank v. Koch*, 105 N. Y. 630.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

STEWART v. MULHOLLAND.

[88 KENTUCKY, 88.]

WILLS, REVOCATION OF, BY MARRIAGE. — A will made by a single woman three days before her marriage, with the consent of her intended husband, who, by antenuptial contract entered into on the day of the marriage, relinquished all interest in her estate, and agreed that she should hold it as her separate property, with power to dispose of it by will, is not revoked by the marriage, as the will, the contract, and the marriage were so nearly and directly connected as to make the whole but one transaction. Section 9 of chapter 13, General Statutes of Kentucky, providing that "every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin," does not apply in such a case.

WILL ONCE REVOKED BY MARRIAGE OR OTHERWISE can only be revived by a valid re-execution. Mere subsequent recognition will not revive it, though it may be an olographic will.

Brown, Humphrey, and Davis, for the appellants.

James S. Pirtle and William Lindsay, for the appellees.

PRYOR, J. Mrs. Mary Hall Jacob, being about to intermarry with James R. Stewart, was desirous of entering into an antenuptial contract, by which she could secure to herself the right to hold and use her property as her separate estate, and to make such disposition of it as she saw proper by last will and testament. She communicated her wishes to her intended husband, and, obtaining his consent, prepared a will in her own handwriting, by which she devised her estate, one half of it to her future husband, Stewart, and the remaining half to her two nieces, excluding from the general devise an

interest in a dwelling-house in Elizabethtown, that she devised to her nephew. She had three brothers and a nephew who were not made the beneficiaries by that instrument, and who are now contesting its probate. A sister of Mrs. Jacob had died many years before the date of the will, leaving children, and among them two infant daughters, one eight days old, and the other two years of age. These children were taken charge of by Mrs. Jacob, and raised by her to womanhood, and are made, together with her husband, the objects of her bounty in the disposition she has made of her estate. The will is dated on the 9th of January, 1876; the marriage contract seems to have been written on the 11th of January, two days after the will was written, and signed by the contracting parties on the 12th of January, the next day, and the same day on which the marriage ceremony was performed.

After the ceremony was over, and the parties made man and wife, the wife, on her way from Elizabethtown to Louisville, on the same day she was married, handed the paper, inclosed by an envelope, to a friend of hers, telling him to keep it safely, that it was her will. This was in the presence of her husband. This friend, the husband of her deceased sister, took charge of the paper, and placed it in the vaults of a bank, where he kept it for three or four years, and Mrs. Stewart, having removed to Wisconsin, it being her husband's home, wrote, after the lapse of three or four years, to her friend to send her the will. This he did. The will was received by her, and kept in a tin box in her custody and that of her husband, until offered for probate. The paper is identified by Samuels, the friend with whom it was left, as the same paper he had the custody of, he having read it, and is identified as the same paper received by Mrs. Stewart from Samuels, and the same taken from the tin box after her death; that she spoke of her will often while living in Wisconsin is abundantly established, and that the paper offered for probate is the paper alluded to by her is settled beyond controversy. The preparation and the execution of this paper by Mrs. Stewart on the eve of her marriage is not in fact controverted, or if denied, is a fact well established.

The propounders of the paper as the last will of Mrs. Stewart are met with the objection by her three brothers, who are the contestants, that the marriage of their sister with Stewart revoked her will, by reason of an express provision of our statute in regard to wills, and the court below, adopting that

view of the case, denied its probate. The ninth section of chapter 113, General Statutes, title Wills, provides: "Every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin." Section 11 of the same chapter also provides that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived, otherwise than by re-execution thereof, or by a codicil executed in the same manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown thereby."

It is manifest, under these two sections of the statute, that a will once revoked can only be revived by a re-execution of the instrument in the manner pointed out by the statute. It is in fact the making of another will, and must be executed in the same manner in which the original will was required to be executed.

The will offered for probate is all in the handwriting of the testatrix, who, at the time of its execution, was the widow of Jacob, and it being olographic, it is contended that its preservation by Mrs. Stewart for so many years, and her frequent recognition of the paper as her will, so often made during a long period of time, amounts not only to a republication of the paper as her will, but such an execution of the instrument as makes it a complete will. There can be no doubt, from the testimony of those intimately acquainted with the testatrix, that she always, from the date of the execution of the paper until her death, regarded it as her last will, and as having given her property to those whose claim upon her affections made them the objects of her bounty. This manifest intention, however plain on the part of Mrs. Stewart, will not be permitted to override the plain letter of a statute that was enacted for the purpose of preventing a litigation over the question of intent, and admitting to probate a paper already revoked, that has no stronger proof of its validity than the mere intention of the maker to impart a new life to the instrument.

The statute in regard to wills, and particularly the two sections referred to, with their meaning and purpose properly understood, leaves but little room for construction. This court, in the case of *Porter v. Ford*, 32 Ky. 191, where testatrix exe-

ecuted a paper in her own handwriting, purporting to be her will, while she was a married woman, and after she became discoverd not only recognized the paper as her will, but made indorsements upon it to that effect, held that as she was then capable of making a will, such a recognition made it a valid instrument, and being all in her own handwriting, there was nothing in the statutes requiring the paper to be rewritten or resubscribed by her after her disability was removed, in order to make it a testamentary paper. It was also held in that case, in construing the section of the statute in regard to revocation, that the section did not apply, because the paper, at no time during the coverture, was valid, but absolutely void, and its recognition after the death of her husband gave to the paper, for the first time, legal vitality. That case, relied on as authority in this case in support of the will, is not analogous, because the question here involved is, whether this will of Mrs. Jacob had ever been revoked; for if revoked, new life could never be imparted to it by mere recognition or a republication, because the statute requires where a will has been once revoked there must be a re-execution; and the will of Mrs. Jacob cannot well be held to be the will of Mrs. Stewart, if that paper was revoked by the marriage with Stewart. By the rule of the common law, the marriage of a woman revoked a will previously made by her, because, if allowed to stand, it would affect the marital rights of the husband, and during marriage no power existed by reason of the disability of the wife, either to revoke, alter, or make another will. At common law, however, when the wife had the right of disposing of her separate estate by an antenuptial agreement, her will previously made was not revoked by her subsequent marriage, and in this state a married woman may dispose of her separate estate by last will and testament: Gen. Stats., c. 113, sec. 4. In this case the power to make a will during the marriage, and the separate estate in the wife, existed by reason of the antenuptial contract between Mrs. Jacob and her intended husband, executed on the 12th of January, 1876, the day on which the marriage ceremony was performed, and two days after the date of the will. It is therefore contended that as the will of Mrs. Stewart, then Jacob, was executed on the 9th of January, it was revoked by the marriage, and not having been re-executed, her estate descends to her heirs at law. This position is based on the section of the statute referred to, by which a will made prior to the mar-

riage is revoked, unless made under a power to dispose of property that would not, if undisposed of, pass to the heirs and representatives of the donee of the power, the argument being that it is immaterial how the power to make such a will is conferred, whether by a contract between the wife and a stranger, or by reason of an antenuptial contract; if the property disposed of by the will before the marriage is the property of the wife, the subsequent marriage revokes it; that the statute is imperative, and no contract by which a will is made prior to the marriage can affect its provisions, although the will is made by the consent of the husband, and under a contract that fixes definitely the marital rights of husband and wife. It must be conceded that the wife, at no time from the date of the will until her death, was disqualified by the disability of coverture, or from any other cause, so far as appears in the record, from making a valid disposition of her estate by last will and testament; and while this same fact exists in regard to her husband, we perceive no reason why the parties, when about to consummate the marriage, may not agree that the wife may, by will, dispose of her estate as she sees proper, or that a will already made may retain its legal virtue after the marriage, and particularly in a case like this. The will was executed by the intended wife, in pursuance of the antenuptial contract. It was made and published by the consent of the husband, he having, by the marriage contract, relinquished all interest in her estate. It was executed as if the contract had been signed and the marriage ceremony performed, and was so directly connected with those two events, as to time, place, and circumstance, as to make the whole but one transaction. The intended husband, before he left his home in the Northwest to consummate the marriage, had agreed that the wife's estate should be secured to her. On the 10th of January, 1876, after reaching her home in Kentucky, she told him that she was then writing her will, or had written it. The antenuptial contract is dated on the 11th, but executed by both the parties on the 12th, the day on which the ceremony of marriage took place. After the marriage, and on the same day she was leaving her home, the wife, in the presence of her husband, confided her will to the custody of her friend in Kentucky, in pursuance of the contract, and, we must presume, with a full knowledge of the statute on the subject of the revocation of wills; and from the date of the marriage until the death of the wife the paper in question

was recognized by both as the will of the wife, although the husband was not aware of its contents.

Giving to the statute in question a reasonable construction, is there any rule of law that would require a court to sever the dates of the two writings and the date of the marriage, with a view of determining that the will of the wife was revoked by the marriage, and the testamentary disposition made by the wife under such circumstances disregarded? The will was in execution of the marriage contract. That contract was signed on the day the marriage took place; it was delivered, although dated on the 9th, to the friend of the wife on that day for safe-keeping, and must be regarded as a part of the entire transaction.

The reason for the enactment of this statute was to prevent fraud upon the husband or wife by reason of a will executed by the one or the other prior to the marriage, and the disturbance or change that would necessarily arise from such an act on the marital relation, in so far as it affected the right of property, and in case of an unmarried woman, for the additional reason that after the marriage the wife would be incapable of making, revoking, or altering her will. In this case, the marriage never deprived Mrs. Stewart of the power to revoke the will made, or the power to make a new will. This right she could have exercised at any time, and when the husband surrenders at the same time his marital rights, even if these transactions cannot be said to have taken place on the day of the marriage, who has the right to complain but the husband? His marital rights are preserved or relinquished at his own instance and by the agreement, and the statute cannot apply, because the very reason for its enactment has been removed. It is not a question here whether the will was properly executed, for its validity prior to the marriage ceremony is not controverted; nor does the question arise as to whether or not an olographic will, once revoked, can be revived by a republication, when the statute requires a re-execution; but the question is, Was the will of Mrs. Jacob revoked by her marriage with Stewart? It is conceded that by a contract the property rights of either could be regulated and fixed; but when a will is made in pursuance of that contract, and in this instance, where it is directly connected with the act of marriage, we are asked to say that the marriage revoked the will, because dated two days prior to the antenuptial contract and the marriage ceremony. The marital rights

having been settled by their agreement, and no one else being interested, directly or indirectly, but the husband, why should the will of the wife be revoked? It could have no effect on after-born children, because, by section 24 of chapter 113, they, and not the devisee, take the estate, unless the child should die under age, and unmarried and without issue. Was the statute intended to apply to any such case as this? It is argued that the exceptions made by its provisions excluded the idea of any other exception. Should such a construction be given its provisions? If there had been no exception, then the language of the statute might have been held to embrace every will made by a married woman, whether under the exercise of a power or not; and to remedy this, the statute was enacted, making an exception where the marital rights could not be affected by the execution of the power. It was to protect the marital rights of parties that the statute was enacted, and it was never designed to prevent parties, by written contract, from fixing their marital rights, and to give to one or both, by an antenuptial contract between the two, the power to dispose of their estate by will. It is idle to say that by a deed evidencing a marriage contract the parties about to consummate it can before marriage fix and determine their right to property by reason of the marital relation that is binding on both, and cannot under the same contract agree that the one or the other shall dispose of their property by a will already executed if made as the statute requires. The will made by the wife in this case was as much a part of the marriage contract as if it had been inserted in it. In the case of *Phaup v. Wooldridge*, 14 Gratt. 332, relied on by counsel for the appellee, the testator made his will, that was properly signed and attested, in the year 1852. Some two years thereafter he intermarried with Mrs. Bass, and by an antenuptial contract she surrendered all interest in his estate. The question in that case, under a statute similar to ours, was, whether the marriage to Mrs. Bass revoked the will of Phaup. The wife was not a party to the litigation, but the will was assailed by the heirs. The court held that the marriage did revoke the will, and that the recognition by the testator, in the presence of one of the witnesses, of the instrument as his will, was not a re-execution; the court further holding that marriage alone, save in the exception made, was an absolute revocation, and that the marriage settlement in no wise affected the construction to be given the statute. While the construc-

tion in that case sustains the views of counsel and the judgment below, the facts are not at all analogous to the case being considered. There the will of Phaup was made long before his marriage, and when he was about to marry Mrs. Bass, two years after, an agreement was entered into by which the wife was empowered to devise her estate, and in consideration of that fact relinquished all interest in his estate. She made no will, nor was she asserting any claim to his property, nor did they contract with reference to the will already made by the future husband. It was a naked proposition submitted to the court as to whether or not the marriage revoked the will. If Mrs. Bass, in that case, in pursuance of the power given her to make a will by the marriage contract, had, in the exercise of the power, and on the eve of the marriage, executed her will, we are inclined to doubt that the court would have permitted the husband to have asserted his marital rights, and held the will void because dated two days before the marriage, when made in pursuance of the antenuptial agreement; still, the reasoning of the court in that case, and the construction given the statute, would lead to the conclusion that the will would have been held to have been revoked.

In the case of *Osgood v. Bliss*, 141 Mass. 474, 55 Am. Rep. 488, the parties were married in the state of Indiana, and on the eve of the marriage made an antenuptial contract, by which it was agreed that the marriage should not revoke a will that had been made by the intended wife. The husband had never seen the will, and knew nothing of its contents, yet he signed the agreement. The statute of Indiana contained no exceptions, but provided: "After the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage." The wife dying, the husband claimed about twelve thousand dollars in money or choses in action, that she had disposed of by her will, on the ground that the marriage rendered the instrument a nullity. The supreme court of Massachusetts held that the marriage did not revoke the power to make the will. It is true, in that case, the court draws the distinction between the execution of a power and the execution of the will, and bases its conclusion on that distinction. They proceed to say that the reason given for holding that marriage is deemed to be a revocation of a woman's will is, because by the marriage she divests herself of the power of revoking it, and destroys the power to change or alter it. It is argued that such reasoning does not

apply to an appointment by will, and for that reason it was held that the marriage was not a revocation. The argument is well founded, and based on the common-law rule, and the statute but follows it; and as such reasoning cannot apply to the exercise of a right by a married woman to make a will, when she, at all times before and after the marriage, had the legal capacity to make a will, that case supports directly the principle recognized in this case. Besides, the marital rights of both husband and wife are fixed by the very contract under which the disability of coverture, in so far as it stands in the way of the execution by her of a will, is entirely removed.

We are satisfied that a proper construction of the statute should not confine the court to the one exception of the exercise of a power to make a will by a married woman, when disposing of the property of another, or of property that would not pass to her heirs, but that the contract rights of husband and wife, determining the right of property and fixing the *status* of the marital relation in that respect before the marriage, although it may recognize the existence of a will then made, if properly executed, should be regarded, and that such cases are not embraced by the statute. The statute of Wisconsin provided, in reference to such wills, "Excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition of the testator." The court held that the revocation implied by law evidently means such as would be implied at common law, — "the marriage of a woman was the revocation of her will previously made." Ann Ward, living in Wisconsin, made a will during her second marriage, by which she gave her property to her children by her first husband. She had no issue of the second or third marriages. By the laws of that state a married woman has the right to dispose of her estate by will. Having made the will during her second marriage, she married Ward, her third husband, and shortly after died. Her will was admitted to probate, the supreme court, to which the appeal had been taken, saying: "To hold that marriage of itself revoked a former will of the wife, under the circumstances here presented, when on the next day after the marriage she had the power to reinstate the same writing as her last will and testament, would seem to be absurd": *Will of Ward*, 70 Wis. 251; 5 Am. St. Rep. 174.

In view of our statute, it seems to us that it would be trifling with the rights of the husband and the devisees of Mrs. Stew-

art to so construe its provisions as to destroy the testamentary act of the testatrix, and if no other reason exists for denying the probate of this paper, it should be admitted to probate as the last will of Mrs. Stewart, formerly Jacob.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

WILLS, REVOCATION OF, BY MARRIAGE. — As to the revocation of a will by marriage and the birth of a child, see *Young's Appeal*, 39 Pa. St. 115; 80 Am. Dec. 513, and note 516-519; note to *Harwell v. Lively*, 76 Am. Dec. 656; note to *Graves v. Sheldon*, 15 Am. Dec. 659-661; note to *Pickens v. Davis*, 45 Am. Rep. 342. In *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328, and note 329-331, the rule is laid down as to when a woman's antenuptial will is not revoked by her marriage. And also in *In re Hunt*, 81 Me. 275.

Where a husband before marriage covenants with his intended wife that she may dispose of her property by will, a will made by her to that effect during coverture is valid, even though the property is not held for her by trustees: *Barnes v. Irwin*, 2 Dall. 192; 1 Am. Dec. 278. Compare note to *Cutter v. Butler*, 57 Am. Dec. 340-349.

LOUISVILLE AND NASHVILLE R. R. Co. v. BERRY.

[38 KENTUCKY, 222.]

EVIDENCE, ADMISSIBILITY OF, FOR PURPOSE OF IMPEACHMENT OR TO ESTABLISH NEGLIGENCE. — In an action against a railroad company to recover for personal injury to a boy fourteen years of age, not a trespasser, and conclusively shown to have been injured because of a defective railroad platform, by means of which he was thrown under a moving train and crushed, evidence on the part of the defense that such boy was in the habit of jumping on moving trains at that place, and had been warned of the danger, is incompetent to contradict his testimony as to the manner in which he received the injury, or to show that it was caused through his negligence.

Barnett, Noble, and Barnett, and William Lindsay, for the appellant.

Baker, Kinney, and Kinney, O'Neal, Jackson, and Phelps, and James W. Head, for the appellees.

PRYOR, J. The appellee Berry, a boy about fourteen years of age, at the instance of Mrs. McGee, with whom he lived and by whom he was controlled, accompanied a lady and her child to the depot of the defendant, to aid her in boarding the train. It was after night, and dark, when the train approached. The platform from which passengers get on and off the train lies between the two tracks of the railway, and is about four feet wide, with the edge of the cars, when they reach the plat-

form, extending over it some four or five inches. After the boy had reached the platform and the lady had entered the car, the boy, on leaving the platform, stepped with one foot into a hole that had been caused by the rotting of the plank, causing the appellee to fall, with one leg protruding, under the wheels of the cars as they moved off, crushing his ankle and foot in such a manner as required his leg to be amputated. That the company knew of the defect in the platform, or by the exercise of ordinary care should have known it. He claimed and was awarded compensatory damages for the injury sustained. The case went to the superior court, and was there affirmed, and an appeal was then prayed and granted to this court.

The boy testifies as to the fall caused by the defect in the platform, and the injury received. The hole in the platform at the place where the boy says he was injured was visible, and caused by the decay of the timber; blood was seen near the place where the injury occurred, and he was carried from the spot by those who heard his cries of distress in that direction.

The foot or ankle was crushed as the train moved off. That the platform was much out of repair, and had been for a long time, is sustained by the weight of the testimony, and the injury to this boy caused by this defect in the platform, that should have been observed and remedied by the defendant's employees. We are satisfied from the testimony that the injury resulted from the causes alleged in the petition; but the appellant, in making out its defense, insisted on proving by the appellee and others that he was in the habit of jumping on the cars when they stopped at the station, and had been warned of the danger, and hence the jury had the right to infer that it was the boy's own negligence that caused the injury, and not the defect in the platform. If the habit of the boy had been established, as the appellant offered to prove, it would not have authorized the jury to say that he was stealing a ride on the cars, and in getting off caused the injury. It is shown that he was sent to the depot by the lady with whom he lived; that he accompanied the passenger to the train at her instance, and had the right to be on the platform at the place where he was injured. That he was at this particular spot, and was injured by reason of the defective and rotten plank, is sworn to positively by the boy, and his statement corroborated by circumstances that are convincing; and

the mere fact that he had been in the habit of exposing himself to danger on former occasions, or had theretofore placed himself in positions where he might have been injured in the same manner, was not only insufficient to contradict the testimony on that subject offered by the plaintiff, but was incompetent for any purpose. Neither the boy's habits or his bad character constituted a defense to the recovery. The opinions of one or more witnesses for the appellant were permitted to go to the jury, to the effect that the boy was not injured in the manner stated by him, and an instruction given by the court, to the effect that if the boy was stealing a ride on the train of appellant, and thereby caused the injury, the company was not responsible. Whether there was proof to authorize such an instruction it is not necessary to determine, but the fact that he had previously been guilty of such negligence threw no light on the issue made. Such misconduct on the part of the appellee did not prevent him from recovering, if injured by reason of this defect in the platform.

In *Gahagan v. Boston etc. R. R. Co.*, 1 Allen, 187, 79 Am. Dec. 724, the issue presented was as to the negligence of the company in the use of the highway at the time the plaintiff's intestate received the injury for which the recovery was asked. The plaintiff offered to prove the habit of the company at other times in the use of the highway, to show negligence, and the court held that it had no legitimate bearing on the issue, and was properly excluded.

There was evidence for both the appellee and the appellant, showing the movements of the boy from the time he reached the depot until he was injured, and from that evidence the jury returned their verdict. "As a general rule, therefore, it is inadmissible when the issue is whether A did a particular thing, to put in evidence the fact that he did a similar thing at some other time. To admit evidence of such collateral acts would be to oppress the party implicated, by trying him on a case as to which he has no notice to prepare, and sometimes by prejudicing the jury against him by publishing offenses of which, even if guilty, he may have long since repented, or may have long since been condoned": 1 Wharton on Evidence, sec. 29.

The effect of such testimony as was excluded in this case, if permitted to go to the jury, would have been to prejudice the jury, or at least lead their minds to the conclusion that if a bad boy, although injured by the neglect of the company,

his measure of compensation should be lessened by reason of his reckless or mischievous habits.

We perceive no objection to the instructions; in fact, they were more favorable for the appellant than they should have been; nor does the alleged misconduct of the juror or counsel for the defendant authorize a reversal.

The judgment below is therefore affirmed, with damages.

NEGLIGENCE — EVIDENCE. — Evidence of previous accidents of a similar nature are not admissible in an action against a railroad company for negligence: *Southern R. R. Co. v. Kendrick*, 40 Minn. 374; 90 Am. Dec. 332, and note; *Bridger v. Ashville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653; *Hudson v. Chicago etc. R. R. Co.*, 59 Iowa, 581; 44 Am. Rep. 692, and note 694-696; *Parker v. Portland P. Co.*, 69 Me. 173; 31 Am. Rep. 262; *Hodges v. Beares*, 129 Ill. 87.

In an action for personal injuries sustained by reason of an obstruction in a highway, evidence that others passed safely is not competent: *Branch v. Libbey*, 78 Me. 321; 57 Am. Rep. 810, and note.

Evidence that other railroad companies maintained bridges similar to the one by which plaintiff was injured is not competent in an action by an employee for injuries sustained through the negligent construction of a railroad bridge: *Louisville etc. Ry Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432. To the same effect is *Engel v. Smith*, 82 Mich. 1.

LOUISVILLE AND NASHVILLE R. R. Co. v. LOGAN.

[88 KENTUCKY, 282.]

RAILROADS — RIGHT TO EJECT DRUNKEN AND DISORDERLY PASSENGER. —

Where the conduct of an intoxicated passenger, too drunk to take care of himself, is so violent or indecent as to excite alarm, or insult other passengers, or if he interferes with the management of the train by pulling the bell-rope, or otherwise, or threatens, with an opened knife, to take the life or do bodily harm to the conductor, or attempts to deter or intimidate him while in the performance of his duties, he has the right to put him off the train at night and between stations, using no more force than is reasonably necessary for the purpose, and putting him off the track out of the way of that train. The company is not then liable if such passenger subsequently goes upon the track, and is run over and killed by another train belonging to it.

William Lindsay and W. J. Lisle, for the appellant.

Harrison and Belden, for the appellee.

LEWIS, C. J. Appellee, widow of E. V. Logan, brought this action to recover damages for destruction of his life by the alleged willful neglect of the servants of appellant, the material facts of the case being as follows: —

The deceased, about half-past ten o'clock at night, June 19,

1883, at Lebanon, got on a passenger train bound from Louisville to Knoxville, Tennessee, to go to a station where he resided, fourteen miles distant. He was at the time intoxicated; stumbled or slipped and fell on the depot platform; was helped upon the car platform; and, in the opinion of two witnesses, too drunk to take care of himself, though he was also boisterous, profane, and disposed to be quarrelsome.

Upon being requested by the conductor, soon after the train started, to pay his fare, he asserted he had paid it, which was untrue, and in reply to the statement of the conductor he had not, he said, with an oath, he would not; that there were not men enough on the train to put him off, at the same time pulling out his knife, and did not pay until the conductor and brakeman had proceeded with him to the car platform for the purpose of putting him off. After receiving his fare, the conductor left him in the smoking-car, where his seat was, and proceeded to the ladies' car to collect fare from those who had boarded the train at Lebanon, and while so engaged the deceased, leaving the smoking-car, went behind him, having, as some of the witnesses testify, a knife opened in his pocket, and assuming a menacing attitude, applied to him, in a loud tone of voice, such profane, opprobrious, and threatening language as to cause general excitement among the passengers, one lady being so much frightened that she implored the conductor to remove him from the car. The deceased then returned to the smoking-car, and upon being soon after approached and admonished by the conductor to keep his seat and be quiet, he drew his knife, and threatened to kill him; and after the conductor returned to the ladies' car, the deceased again tried to enter it, but being unable to do so because the door had been locked to keep him out, he, on his way back to the smoking-car, pulled the bell-rope the number of times required to stop the train, and it was, in obedience to his signal, stopped by the engineer. The conductor then went into the smoking-car, and telling the deceased, who, though he had just taken his seat, pretended to be asleep, that he would not permit any one to pull the bell-rope, and paying back his fare, with the aid of the brakeman put him off the train, and left him. The place where it was done is about four miles from Lebanon, two from the nearest station south, about one hundred and fifty yards from a private crossing of the railroad north, and two hundred from the nearest farm-house. Early the next morning the muti-

lated body of the deceased was found about twenty-five yards north of the private crossing mentioned, and his hat, a sack and bucket, which he had the night before, were near the place he was put off the train, his hat being nearest the body. Three trains passed the place where his body was, after he was expelled from the passenger train, two going north, one of which passed within about one hour and a half, the other later in night, and the third going south about daylight. It is plain he was not killed by being struck or run over by the passenger train from which he was ejected; for not only was his body found near two hundred yards north of where he was left by it, but a little more than twenty-five yards north of the place on the track where there was the first appearance of blood, showing conclusively the train by which he was killed was going north.

Assuming, as the evidence seems to warrant, that he was killed by one of the north-bound trains, though by which one of the two does not appear, the first inquiry is, whether any legal liability has been fixed upon appellant on account of negligence of those in charge of it; and as there is no evidence showing at what time in the night, or why, he went upon the track in front of a passing train, if he did so voluntarily, nor whether he was in such position at the time of being struck as to make it the duty of those in charge to stop the train, or as to enable them, by the exercise of proper diligence, to discover him in time to prevent a collision, or at all, and consequently none whatever of any negligence or fault on their part, that question must be answered in the negative.

It thus results that whatever cause of action there may be in favor of appellee arises entirely from the conduct of the conductor of the passenger train, and the liability of appellant therefor, if liable at all, is not dependent upon nor increased by the fact that the train by which he was subsequently killed was owned and operated by the same company; for if the act of the conductor was not itself wrongful, it could not be made so by referring it to or connecting it with the independent act of other employees, to whom no wrong can be attributed.

Counsel argue, in effect, that when an intoxicated person offers to go upon a railroad train as passenger, the alternative is presented to the company either to refuse permission, or else, having received him and accepted his fare, to answer in damages for whatever calamity to him may follow his sub-

sequent expulsion, though justified by his improper conduct. Although it has been held that a railroad company is not bound to receive and carry a person who is so intoxicated as to be offensive, the power to exclude one from the right of traveling on a train, who offers to pay his fare, and, though intoxicated, has not been guilty of any conduct as passenger forfeiting the right, is always subject to be called in question, and the company cannot therefore be fairly held to a strict exercise of it, except where the rights of others are involved. But even conceding the conductor could have forcibly, and without incurring any legal liability to him, kept the deceased off the train at Lebanon, and committed an error in failing to do it, we do not see how, on that account, the right was impaired, or the duty lessened, to put him off at any place or time afterwards, when his behavior rendered it legal and necessary. And if the deceased, for whose drunken state the company was in no way responsible, acted so as to justify and require his expulsion, it would be a harsh rule to make the company liable, if not otherwise so, merely because the conductor did not assume the risk and responsibility of deciding, even if aware of the fact, that he was too much intoxicated to be allowed to go upon the train at Lebanon. Then, regarding the deceased upon the train by his own volition, which the conductor did not nor was bound to oppose, the main question is, whether the willful neglect of appellant, or its servants in charge of it, to perform any duty it owed to him, was the proximate cause of his death.

The law makes it the duty of a railroad company to use all reasonable care in operating trains for both the safety and protection from molestation and insult of passengers; otherwise, orderly and infirm persons and females, who, upon the faith of such protection, frequently travel unattended, would have no security against turbulent, bad men; and as it is obvious a train must be run with skill and system in order to assure safety and comfort, the conduct of any one who interferes with the management, or without just cause attempts to do bodily injury to, or put in fear, those in charge, is reprehensible and unlawful. But a railroad company is not required to keep at hand armed police to arrest and confine on a moving train those who violate its necessary rules or do injury to other passengers, nor can the employees neglect their duties, upon the faithful performance of which the safety of all depends, in order to do so. Consequently the only effectual remedy for

or security against disorderly and lawless behavior on board a passenger train is the immediate and summary expulsion of the wrong-doer, and plenary authority of the conductor to do it is universally recognized, and required to be exercised whenever necessary for the safety or protection of either passengers or employees.

It is clear, from the evidence in this case, the conduct of the deceased was such as to justify his expulsion; for he not only, with a hostile purpose, left his proper place, and pursued the conductor into the ladies' car, where he disturbed, alarmed, and offended the passengers, but, baffled in an effort to enter it a second time with the same intent, he wantonly and slyly pulled the bell-rope, whereby the train was stopped between stations. Moreover, his behavior to the conductor was without provocation, and such as to afford to him reasonable grounds to believe he was in danger of bodily harm, if not of losing his life. In fact, the *gravamen* of the action, as stated in the petition, is not based upon the lack of legal cause for the expulsion, but rather upon the circumstances of time, place, and manner it was done, in view of the alleged physical and mental condition of the deceased. Though the time was at night, it was not too dark to see the railroad track distinctly, nor was the weather either cold or inclement; while it would, in fairness, seem no more than retributive justice that he was put off at the place his own malicious and unlawful act caused the train to stop, especially as the locality was not unsafe.

The question then arises whether, notwithstanding his continued presence on the train was so offensive and dangerous, both to the conductor and other passengers, as to justify and require his expulsion, the paramount duty was imposed upon the company, by reason of the mental and physical condition of the deceased, to carry him to the next station, the non-performance of which is, in legal contemplation, willful neglect.

It was not enough for the jury in this case to find he was too intoxicated to take care of himself; but, to constitute willful neglect, even if the company was under obligation to look after his safety after he had forfeited his right as passenger, it was necessary that the conductor knew, or had reasonable grounds to believe, not in the language of one of the instructions of the lower court that to put him off the train "would necessarily expose him to the danger of death from being run over

by passing trains," but that such would be the natural and probable result of putting him off.

If his actions while on the train, by which alone the conductor could or was required to judge, be taken as evidence of what his actual condition was, he not only had the power of locomotion, as shown by his passing with entire safety to and fro between the cars while the train was in motion, but knew well how to do mischief to others, and was at the same time extremely sensitive of injury to himself. And it seems to us, in the light of the undisputed facts of the case, unreasonable to charge the company with negligence of any degree in expelling him from the train at the time and place it was done. But as it is proper, we will consider the relation and mutual obligations existing between him and the company, as though it was an open question of fact whether the conductor knew, or had reasonable grounds to believe, he was too intoxicated to take care of himself.

It is well settled by this court, and the certain and just execution of the law and welfare of society require it to be settled, that voluntary drunkenness affords no excuse for the commission of crime; nor is it a valid defense to an action for a civil injury. For in every situation and relation an intoxicated person, like others, should be held to the strict observance of the just and salutary rule which requires each one to so use and enjoy his own as not to injure others. It thus becomes lawful for a landlord to expel from his tavern to the street or highway, at any time, a person who, whether intoxicated or not, endangers the safety or molests and insults his guests; and no one would question the right of a housekeeper to eject from his domicile a drunken man who maltreats or offends, by indecent conduct or language, his wife and children, provided no more force be used for the purpose, in either case, than reasonably necessary. Such being a rule of conduct recognized as just and necessary, we do not see why it ought not to be applied, upon the same conditions, for the benefit and protection of passengers on a railroad train, nor why they should be given the right to maintain an action against a railroad company for suffering them to be molested, put in fear, and insulted on a train by drunken men, while denying the company the right, except at its peril, to resort to the only feasible means in its power to prevent or stop the wrong being done. Common justice would seem to require either that passengers be left without redress against the company for wrong and in-

jury done to them on trains by disorderly and vicious persons, or else that no liability attach or negligence be imputed to the company when the expulsion of the latter is rendered necessary for the safety and protection of the former. Thus the issue in every such case as this is really between the orderly, infirm, and females on the one side, and the turbulent and evil-disposed on the other, and the company has the right to terminate the relation of carrier and passenger between it and the latter class whenever and wherever they lawlessly put in fear, disturb, or insult the former; and in our opinion, if the deceased went into the ladies' car, and there, by his violence and indecent behavior or language, excited, alarmed, or insulted the other passengers, or if he interfered with the management of the train by pulling the bell-rope, or otherwise, or if he threatened, with an opened knife, to take the life or do bodily harm to the conductor, or attempted to deter or intimidate him while in the performance of his duties, the right existed to put him off the train at the place it was done, and all required of the company was to use no more force than reasonably necessary for the purpose, and to place him off the track, out of the way of that train; for although there might be a case where a railroad company would be guilty of willful neglect, in the meaning of the statute, by ejecting, without imperative necessity, a passenger so drunk as to be helpless, when his death would naturally and probably result from agencies other than his own act, then present and impending, the law does not exact care and precaution against the death of one, from remote causes or self-inflicted, whose conduct has afforded legal grounds for his expulsion.

The case of *Louisville, C. & L. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, is unlike this. There the only cause for expulsion was the failure, by reason of inability, to pay the fare, which was twenty cents. Here the deceased was able to pay, but threatened violence because he was urged to pay, and compelled the conductor to resort to force to get it. There the delinquent was not turbulent nor offensive to either passengers or employees. Here the deceased not only insulted and alarmed the passengers, but menaced the conductor and imperiled the safety of all on board by causing the train to stop. In that case Sullivan was inhumanely put off in a deep snow, the weather being intensely cold, and on account of his helpless condition, which the conductor knew of, was unable

to escape the injury that was at the time manifestly inevitable. In this case the deceased was killed by his own act, in going upon the track at least one hour and a half after he was put off the train, which the conductor had no reason to believe, from his actual condition, as it appeared to him, was probable.

As the lower court refused to give any instruction according with the views here expressed, but, instead, gave those which are either abstract or erroneous and misleading, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

CARRIERS OF PASSENGERS — EJECTION OF DRUNKEN PASSENGER. — Passengers may be expelled from vehicles of common carriage for intoxication, offensive conduct, or boisterous demonstrations; but they must be exposed to as little peril as is possible under the circumstances; *Note to Cincinnati etc. R. R. Co. v. Cooper*, 16 Am. St. Rep. 339, 340.

McKENSEY v. EDWARDS.

[88 KENTUCKY, 272.]

CORPORATIONS — LIABILITY OF DIRECTORS ON NOTE EXECUTED BY THEM.

— A note by which "the directors" of a corporation promise to pay a certain sum, and signed by them without official designation, must be regarded as the undertaking of the parties whose names appear to it as obligors, and not that of the corporation; and the question of individual or corporate liability must be raised by answer, and not by demurrer.

CORPORATIONS — LIABILITY ON NOTE SIGNED BY DIRECTORS. — A note by which the directors of a corporation promise to pay a certain sum, and signed by them without official designation, is *prima facie* the obligation of the signers alone, and imports no undertaking to pay on the part of the corporation. In order to make it liable on the note, it is necessary to aver and prove that the undertaking was for the use and benefit of the corporation, and that by mutual mistake the note was executed and signed by the obligors as individuals.

J. J. Landrum, for the appellant.

J. W. Greene, for the appellees.

HOLT, J. The appellant, R. McKensy, as the assignee of the obligation, seeks to obtain a personal judgment upon this note: —

"JONESVILLE, KY., Aug. 12, 1879.

"The directors of the Jonesville and Glencoe Turnpike

Road promise to pay to Andrew Hearne two hundred dollars, this note bearing ten per cent until paid.

"J. W. EDWARDS.

"G. W. HERNDON.

"JOSEPH BROCK.

"J. L. GREEN.

"LEMUEL BEATTY.

"JOHN MCKENSEY."

The petition is in the usual form when based upon a promissory note. A demurrer was sustained to it, and the action dismissed upon the ground that the writing is the obligation of the corporation, and not of the signers as individuals. We find no case decided by this court where the obligation sued upon was exactly similar.

In the cases of *Trask v. Roberts*, 1 B. Mon. 201, and *Whitney v. Sudduth*, 4 Met. 296, the promise of the defendants to pay was both joint and several. The obligations were clearly of this form, and the cases were made to turn upon this point, as it was held that the several promise could not be otherwise than personal. The case of *Yowell v. Dodd*, 3 Bush, 581, is distinguishable from the one now before us. In that case the obligation reads thus:—

"Twelve months after date, the *president* and directors of the Hustonville and Bradfordsville Turnpike Road Company will pay Leroy Yowell twelve hundred dollars, for value received, at six per cent interest from date, this 16th of November, 1865.

"E. J. DODD, Pres.

"JAMES YOWELL.

"JAS. J. DRYE.

"M. P. DRYE.

"WM. L. MCCAIN."

It was held to be the obligation of the company. The differences between it and the writing now in question are italicized above. It does not appear that the president of the company united in the execution of this one. This, however, may not be material. The record does not disclose whether it is so or not. The word "company," however, does not appear in it, and no official designation is annexed to the name of any one of the signers. Upon the other hand, no personal pronouns or words expressly indicating a personal liability are used. No action could, however, have been maintained upon it against the corporation without an averment of mis-

take or fraud in its execution. No company is mentioned. Upon the face of the note there is no one to sue but the makers of it. A petition founded upon it against the corporation would not have been sufficient, if drawn in the usual form upon a note. It would have been necessary to aver a mistake in its execution, and ask a reformation of the obligation. The party would have been compelled to set up the omission as a mistake in the drafting of the note, and that by inadvertence, or for some other reason, it did not show the real and true obligor.

The face of the obligation does not show that the corporation received the consideration, or that it was applied to its benefit, and an action could not be maintained upon it against a corporation without averring and proving, if denied, that it was executed and received as its obligation, and that by a mutual mistake in its execution this fact was not made to appear. Upon the face of the note the corporation is not *prima facie* liable. It cannot properly be said that upon its face it purports to be the note of the company. The "company" does not promise to pay it. As it would have been necessary to make these independent averments to maintain an action against the corporation upon it, it necessarily results that the writing must, upon its face, be regarded as the undertaking of the parties whose names appear to it as obligors; and the question of individual or corporate liability must be raised by a proper answer, and not by demurrer: *Pack v. White*, 78 Ky. 243.

Judgment reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

CORPORATIONS—PERSONAL LIABILITY OF DIRECTORS.—The personal responsibility of the directors of a corporation upon contracts entered into on behalf of the corporation is governed by the ordinary law of principal and agent; if they fail to contract in such a manner as to bind the corporation, they bind themselves. So where they execute a note, affixing merely their individual names, they are individually liable thereon: Note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 649, 650. Where the president of a corporation, having no seal, executes a contract as president, under his hand and a common scroll for a seal, it will neither be his own contract nor that of the corporation: *McCauley v. Jenney*, 5 Houst. 32. A deed purporting to be executed by a corporation to one as a trustee, which bears the signature and seal of the president, with the suffix of "President of D. R. Co.," and also the signature and seal of the trustee, with but one subscribing witness, is not the deed of the corporation, but the personal act of the president: *Clayton v.*

Cagle, 97 N. C. 300. The corporation may, however, by ratification bind itself upon such contracts on which it would not otherwise be liable: *Taylor v. Navigation Co.*, 105 N. C. 484; *Patterson v. Robinson*, 116 N. Y. 193. Compare *Liebecher v. Kraus*, 74 Wis. 387; 17 Am. St. Rep. 171, and note.

LEATHERMAN v. TIMES COMPANY.

[88 KENTUCKY, 231.]

STATUTE OF LIMITATIONS—AMENDMENTS BRINGING IN NEW PARTIES.—

Where a plaintiff commences his action against a corporation, and it is served with summons as such, when no such corporation exists, and, after the statute of limitations has fully run, he amends his petition so as to bring in new parties as partners and defendants, the new parties so brought in may successfully rely upon the statute of limitations as a defense.

J. M. Chatterson, and Baker, Kinney, and Kinney, for the appellant.

F. Hagan, for the appellees.

BENNETT, J. The appellant, in November, 1884, commenced action against the Times Company as an incorporated institution for the purpose of printing and publishing a newspaper, called the Louisville Times, etc., and Dr. Keller. The appellant sought to recover damages for an alleged libel published in said paper upon him. The appellant dismissed the action as to Dr. Keller.

An answer was filed in the name of the Times Company, without disclosing whether or not it was an incorporated institution or merely a private concern, alleging the truth of the libelous matter charged. The pleadings having been made up for more than a year, the Times Company filed an amended answer, disclosing the fact that it was not incorporated. Thereupon the appellant filed an amended petition, setting up the fact that his allegation that the Times Company was a corporation was a mistake, and that the Times was a private concern, owned and published by the appellees Haldeman and Logan as partners. These two persons were summoned to answer this amended petition. They answered, among other things, that more than one year having elapsed since the publication complained of, the action against them was barred by the statute of limitations of one year. The lower court, deeming the reply to this plea insufficient, sustained a demurrer to it, and the appellant declining to plead

further, his action was dismissed. The sole question is, Was the demurrer properly sustained?

The appellant, in support of his contention that the demurrer was improperly sustained, relies upon the case of *Heckman's Adm'r v. Louisville and Nashville R. R. Co.*, 85 Ky. 631.

In that case the administrator, by mistake, sued the Louisville, Cincinnati, and Lexington Railway Company for an injury to his intestate, resulting in his death. An answer was filed, apparently in the name of said company. It was discovered afterwards that the Louisville and Nashville Railroad Company operated the road, and did the injury complained of, instead of the Louisville, Cincinnati, and Lexington Railroad Company, and that the Louisville and Nashville Railroad Company had in fact filed the answer. Upon the discovery of the mistake, the true state of case, by amendment, was set up, and judgment was asked against the Louisville and Nashville Railroad Company. To the action as amended the Louisville and Nashville Railroad Company interposed the plea of the statute of limitations. It was held that where a person against whom a cause of action exists is sued by the wrong name, and a summons is served upon him, though in his wrong name, and he appears and files an answer, though in the name by which he was sued, he is thereby effectually brought before the court. Thus if a person having a cause of action against A sues him in the name of B, and A is served with summons in the name of B, and answers in that name, he thereby adopts the *alias*, and effectually brings himself before the court.

Here the attempt was made to bring the Times Company before the court as a corporation, and to recover judgment against it as a corporation, but no such corporation was in existence; therefore the Times Company representing individuals as partners, and not a corporation, such individuals were not brought before the court by filing the action against the Times Company and issuing summons thereon in that name alone. Had the appellees been made defendants to the original action, in connection with the Times Company as an alleged corporation, and had been summoned and answered, or had appeared and answered without having been summoned, in such case the mistake in suing the Times Company as a corporation would not have availed the appellees on their plea of the statute of limitations. But the appellees, as the owners of the Times, were not made defendants until more than

a year after the cause of action had accrued; therefore this case is wholly unlike the Heckman case, *supra*. But the case falls within the principle that where a plaintiff commences his action against the wrong party, when no such party was in existence, and, after the statute of limitations has fully run, amends his petition by bringing in new parties as defendants, the parties so brought in may successfully rely upon the statute of limitations as a defense. Also, as intimated, the bringing of the action against the Times Company by that name did not have the effect of bringing the individual members of the company before the court, nor of suspending the statute of limitations as to them; for the statute of limitations is not suspended by merely filing the petition in the proper court, but a summons must be issued against the defendants before the statute is suspended.

The fact that the original summons was served by the sheriff upon the appellant, Logan, as the business manager of the supposed corporation defendant, did not have the effect to bring him before the court as a defendant.

The judgment is affirmed.

LIMITATIONS OF ACTIONS — AMENDMENT. — Unless some new claim or title not previously set forth is set up by way of amendment, the plea of the statute of limitations will be determined with reference to the date when the original complaint was filed: *Chicago etc. R. R. Co. v. Bills*, 118 Ind. 221; *Sublett v. Hodges*, 88 Ala. 491; *Vanderlics v. Matthees*, 79 Cal. 273; *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 417; *Pennsylvania Co. v. Sloan*, 125 Ill. 73; *Rowland v. Murphy*, 66 Tex. 534. But where an amended complaint brings in new parties, they are entitled to have the period of limitation estimated as to themselves from the date of the acquirement of their rights in the subject-matter down to the filing of the amended complaint: *Rucker v. Dailey*, 66 Tex. 284.

JENKINS v. BASS.

[88 KENTUCKY, 397.]

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — ASSIGNMENT. — A note signed by two obligors, and made payable to "order of myself," may be shown by extrinsic evidence to be payable to one of such obligors and to bind the other obligor thereon to the payee, and a third party who holds the note by indorsement from the payee may hold both obligors bound thereon.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — ASSIGNMENT. — One who makes a note payable to himself may become bound thereon to another by writing his name on the back of the note and delivering it to such other party. This under section 13, chapter 22, General Statutes of Kentucky.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — PAROL EVIDENCE TO EXPLAIN. — Where a note reads, "We promise to pay to the order of myself," and is signed by two obligors, parol evidence is admissible to show which of the two obligors was intended as the payee.

Dulaney and Mitchell, for the appellant.

Wright and McElroy, for the appellee.

BENNETT, J. The appellant, James L. Jenkins, declared on a writing that reads as follows:—

"BOWLING GREEN, KY., July 8, 1886.

"Sixty days after date, we promise to pay to the order of myself three hundred and sixty dollars, value received, negotiable and payable at Warren Deposit Bank without defalcation.

"E. R. MURRELL.

"J. N. BASS."

Indorsed on the back of this writing is the following:—

"Pay to James L. Jenkins or order. E. R. MURRELL."

The appellant, as the above-named assignee, declared on this writing as a promissory note, and sought to recover judgment on it against E. R. Murrell and the appellee, J. N. Bass, as the makers. E. R. Murrell made no defense. But the appellee, Bass, filed a general demurrer to the petition, which the lower court sustained. The appellant then filed an amended petition, in which he alleged that the note was executed by E. R. Murrell and the appellee, Bass, for the purpose of enabling the former to borrow money upon it, but it was not known at the time the note was signed from whom he could or would obtain the money, so Murrell and the appellee, Bass, agreed that a space should be left in the note for the purpose of inserting the name of the lender as the payee, or that Murrell might insert the name of himself as payee, and by an indorsement on the back of the note order the same payable to whomsoever he chose; that pursuant to the authority of the appellee, Bass, Murrell wrote the word "myself" in said space, which word he intended to represent his own proper name; and thereafter, Murrell having sold said note to the appellant for value, he indorsed the same to appellant by writing his name across the back of it, which was pursuant to the authority of the appellee.

The lower court sustained a demurrer to this amended petition, and the appellant declining to further amend, his action was dismissed, and the case is here by appeal.

Section 18 of chapter 22 of the General Statutes reads:

"Whenever a promissory note is made by the obligor payable to himself or to his order, and is signed on the back thereof by the said obligor, and then delivered, such signature and delivery shall operate as a promise to pay the face of the note at maturity to the party to whom the same shall have been delivered, and such party may fill up the blank with words of promise, and recover thereon in the same manner as if such party had been named as payee in the note, and such note shall be assignable as are other promissory notes."

According to common-law principles, a promissory note made payable by a person to himself creates, of itself, no liability upon him to pay it. This is so, not for the reason that it is contrary to public policy, immoral, or illegal, but for the reason that a person cannot contract with himself. So the statute *supra* provides that a person who makes a promissory note payable to himself may become bound thereon to another person by writing his name on the back of the note and delivering it to such person. In such case, he becomes bound upon the writing as his promissory note to such person. In the case at bar, if the name of E. R. Murrell, instead of the word "myself," had appeared in the face of the note as payee, it will not be denied that he, by writing his name on the back of the note and delivering it to the appellant, would have become bound thereon to the appellant.

In the case just supposed, is there any reason why the appellee would not have been bound to E. R. Murrell on said note? It is true that Murrell would not have been bound to pay himself, not, as above suggested, because it was contrary to public policy, immoral, or illegal, but because he could not, in the nature of things, be a debtor to himself; but the appellee could become debtor to him, and by signing a note as payor, with E. R. Murrell as payee, he would make himself debtor to E. R. Murrell the amount that the note called for. Would the fact that E. R. Murrell's name was also signed to the note as payor render the note unobligatory upon the appellee? We think not. The fact that he also signed the note as payor would not render it, in any sense whatever, vicious, but he would not be bound, as above suggested, simply for the reason that he could not bind himself to pay himself a debt. Had a married woman signed with the appellee, her act would not have been void, but, nevertheless, the appellee would have been bound for the whole amount of the note. So, likewise, he would have been bound to E. R. Murrell if his name had been

expressed in the note as payee, notwithstanding the fact that he did the nude act of trying to make himself, in conjunction with the appellee, debtor to himself. So, also, in the case supposed, had E. R. Murrell assigned the note to the appellant, the appellee, without doubt, would have been bound to him on the note, and under the statute *supra* E. R. Murrell would have been also bound to the appellant.

It is contended that as the word "myself," as used in the writing, refers equally to E. R. Murrell or the appellee as payee, parol evidence cannot be introduced for the purpose of showing which one was meant. This is a mistake. Such evidence will not contradict the writing. Here the note names a payee, and the payee is one of two persons, but the writing does not inform which one is the person meant as the payee. Now, to show by extrinsic evidence which one of the two persons was meant is admissible. Such evidence does not contradict the writing, but merely explains which of two persons the pronoun "myself" refers to as the payee, the pronoun "myself" certainly referring to the one or the other as such payee. The rule is without exception, as far as we have been able to ascertain, that if a payee is expressed in a note, but in such manner as leaves it ambiguous as to the particular person meant, extrinsic evidence may be resorted to for the purpose of showing that fact: 2 Parsons on Contracts, sec. 550; *McCullough v. Wainright*, 14 Pa. St. 171.

In *Jackson v. Sill*, 11 Johns. 201, 6 Am. Dec. 363, it is said: "You must always look beyond the instrument itself, to some extent, in order to ascertain who is meant."

In *Garrison v. Owens*, 1 Pinn. 471, it was held that parol evidence was admissible to show in what capacity a person signed his name, — whether as witness or party to the contract.

In the case of *Kinney v. Flynn*, 2 R. I. 319, the action was on an instrument of this kind: "I O U the sum of \$160, which I shall pay on demand to you." Signed, etc. Parol evidence was admitted to show who "you" was.

It is not competent to show what the parties secretly and in fact intended, when such intention contradicts the written contract; but when the inquiry is what they meant by the use of certain words in the writing which, as therein used, are ambiguous, extrinsic evidence is always admissible: 1 Greenl. Ev. 282.

So it seems to be clear that parol evidence is admissible to

show who the parties meant by the word "myself" as the payee. This being shown, it would follow that the other party would be bound on the note as payor to such payee.

The petition as amended sets out a cause of action against the appellee, and the demurrer to the amended petition should have been overruled.

The judgment is reversed, and the cause remanded, with directions for further proceedings consistent with this opinion.

NEGOTIABLE INSTRUMENTS. — The maker becomes liable upon a note made payable to his own order by indorsement and delivery thereof: *Hall v. Burton*, 29 Ill. 321; 81 Am. Dec. 310, and note. A note payable to the order of "myself," signed by two persons, and placed by one in the hands of the other to be negotiated for his own benefit, may be transferred by indorsement by that other alone; and parol evidence is admissible to show the circumstances: *First Nat. Bank v. Fowler*, 38 Ohio 524; 28 Am. Rep. 610. Parol evidence is always competent to show the real agreement and relation of the parties to a note: *McAteer v. McAteer*, 31 S. C. 313; *Eastman v. Cleaver*, 72 Mich. 167; *Chapman v. Young*, 87 Ky. 476; *First Nat. Bank v. Gaines*, 87 Ky. 597; *Kulenbamp v. Groff*, 71 Mich. 675; 15 Am. St. Rep. 283, and note 287, 288; *Adrian v. McCaskill*, 103 N. C. 181; 14 Am. St. Rep. 788, and note.

CAMPBELL v. COMMONWEALTH.

[88 KENTUCKY, 402.]

CRIMINAL LAW — MURDER — EVIDENCE. — On a trial for murder, where it appears that a father, receiving information that his daughter was being abused by her husband, seized his pistol and went to the residence of the husband, and found the daughter and her children, at night, in the street, driven from her home, and on meeting her husband, shot and killed him, after some words had passed between them, evidence of the son-in-law's previous threats against the accused, and of previous violence against the wife, is competent to show the lawful purpose of the accused in going to the place of the tragedy; but the exclusion of such evidence is not reversible error, when other evidence admitted shows the good faith of the father in his effort to protect the daughter, and that she was in constant danger of bodily harm from her husband.

CRIMINAL LAW — MURDER — EVIDENCE OF SELF-DEFENSE. — Where a father has knowledge of cruel treatment inflicted upon his daughter by her husband, endangering her life, it is his natural and legal right to go to the rescue of his daughter, to prevent the infliction upon her person of cruel and inhuman blows; and if in his effort to do so he kills the husband, evidence of the threats of the latter to take the life of the accused, accompanied by an effort to do so, such as an attempt to draw a pistol at the time, is competent on the issue of self-defense.

CRIMINAL LAW — WHAT WILL REDUCE MURDER TO MANSLAUGHTER — INSTRUCTIONS. — A father has the right to protect his daughter from the personal violence of her husband, and to go to his premises for that pur-

pose; and if he kills him in the heat of sudden passion, in an effort made in good faith to so protect his daughter, it is not necessary that a blow should be given, or a trespass committed on the person of the accused, to reduce the crime from murder to manslaughter. It is reversible error to fail to so instruct the jury, even if a verdict of manslaughter is returned.

CRIMINAL LAW — WHAT WILL REDUCE MURDER TO MANSLAUGHTER — INSTRUCTIONS. — On the trial of a father for the killing of his daughter's husband, the jury should be instructed, when such instruction is justified by the evidence, that as matter of law a father has the right to protect his daughter from great bodily harm against the violence of her husband; that if prior to the day of the tragedy she had been beaten by her husband so as to endanger her life or inflict upon her great bodily injury, of which the accused had knowledge, and that the violence was renewed on the night of tragedy, the father, on receiving information of the fact, had a right to arm himself and go to the residence of the husband to protect his daughter from his violence; and that if finding his daughter and her children expelled from their home into the street by the husband, and suddenly meeting him in the heat of sudden passion caused by the violence to the wife, the father shot him, not in necessary self-defense, and without malice, he is guilty of manslaughter.

F. Hagan, for the appellant.

Frank Parsons and Alpheus Baker, for the appellee.

PRYOR, J. The appellant, Peter Campbell, was indicted by the grand jury of Jefferson County for the murder of his son-in-law, Michael Eady, the trial resulting in a verdict of manslaughter, with the punishment fixed at confinement in the state prison for the period of ten years. The deceased and the daughter of the accused had been married about five years, and from the testimony in the case it was not long after the marriage before his conduct toward his wife became cruel and inhuman. His blows upon her person caused the premature birth of a child. She was driven from his home, at midnight, with her two infant children, or her presence sought by the police of the city at that hour upon a warrant issued at the instance of the husband, and the policeman, instead of giving her shelter in the station-house, carried her to the house of her father. At other times she sought shelter in the outhouses near their residence, or in the cabins of the humble negroes in the vicinity, was abused and beaten in public by the husband, and denounced as a street-walker and common prostitute in the presence and hearing of her neighbors. This cruel treatment of the daughter was brought home to the father, who has been convicted in this case, and he remonstrated time and again with his son-in-law for this brutal

conduct, resulting in widening the breach between them, and causing the deceased at one time to attempt to take the life of the accused by shooting him with a pistol, and was prevented by parties present from firing. On the Saturday night preceding the difficulty in which Eady lost his life, the deceased had driven his wife from her home to her father's, and on the next day (Sunday) the deceased went to the home of the accused, with pistol in hand, threatening to kill him, and was prevented from executing his threat by the wife of the accused closing the door and hiding her husband from his sight. The deceased, from the evidence before us, had an unnatural aversion to both his wife and her father, and this passion, fed and inflamed by the constant use of intoxicating drinks, kept the wife in constant danger of his brutal assaults, that seemed to increase as their married life progressed.

Such is, in substance, the history of these domestic troubles and the connection of the accused with them up to the 31st of May, about nine o'clock at night, when the accused fired the shot that ended his son-in-law's life.

The accused was told about four o'clock in the evening of that day that the deceased was abusing his daughter, and at eight o'clock another messenger arrived, informing him of what was transpiring. He lived about three squares distant from the residence of his son-in-law, and on receiving the last information, seized his pistol, and hurried to the residence of the deceased, and there found his daughter and her children, at night, in the streets, driven from their home; and on meeting his daughter's husband, after some words had passed, according to the theory of the commonwealth, fired at the deceased as he was leaving him, but from the weight of the evidence when he was fronting him, the shot producing death. The theory of the defense is based on the testimony of the accused and another, who state that when they met, Eady cursed and abused the appellant, and made a motion with his hand behind him as if to draw a pistol, when the appellant fired; and in this the accused is corroborated by an eye-witness, who says he saw the pistol on the deceased at the time. Other persons, several in number, heard words pass between the accused and the deceased, but did not understand what was said, and their statements conducing to show, also, that the deceased was making no demonstration when he was shot, but in a defenseless condition.

This is, in substance, the testimony heard on the trial. The

grounds for a reversal of the judgment of conviction arise from the instructions given by the court, and in refusing to permit evidence of the various assaults and batteries made upon the wife by the husband during their married life, with a view of showing the *bona fides* of the father in leaving his home on the night of the killing, with pistol in hand, and going to the rescue of his daughter. It seems to us, from the uncontradicted proof in the case, that there was evidence sufficient to satisfy any reasonable mind that the apprehension by the father of his daughter's danger alone prompted him to go to the home of the deceased on the night of the killing. Threats had been made from time to time against the accused by his son-in-law, by reason of his having interfered for the protection of his daughter, and the entire circumstances and acts transpiring, from which these threats originated, were permitted to go to the jury, with a view of sustaining the plea of self-defense by the accused, and his purpose in leaving his home on the evening of the killing. The details of the treatment of the daughter by her husband, as stated by these witnesses, placed before the jury the real facts of the case, and left no room to question the good faith of the father in the effort to protect his daughter. Other acts of personal violence than those admitted were excluded, but enough was admitted showing that the wife was in constant danger of bodily harm; and therefore this court could not well have reversed this case for the reason alone that this evidence was excluded. To have permitted such an investigation would have prolonged the trial, and shed no light upon the issue between the commonwealth and the accused.

At the time of the shooting the daughter was not in imminent peril. The trouble had just ended, and the daughter and her children on the street, when the accused reached the ground, and therefore there was no reason for permitting these threats against the accused, or the assault and batteries of the wife, to go to the jury in support of the proposition that the father shot his son-in-law to save the life of his daughter. The previous bad treatment of the wife would not justify the accused in taking Eady's life, but it would be competent, as already indicated, to show the lawful purpose of the accused in going to the place of the tragedy.

The threats of the deceased to take the life of the accused, accompanied by an effort to do so, such as the attempt to draw his pistol, would, of course, be competent on the issue of

the defense of the person of the accused at the time he shot. The surrender of all parental control in confiding to the deceased the care and custody of his daughter did not lessen the love of the father for his child, but seems to have created new ties of affection in the birth of two children, that made her the more the object of his love, than when she left the parental roof; and having a knowledge of such cruel treatment as not only destroyed her happiness, but endangered her life, it was his natural and legal right to go to the rescue of his daughter, to prevent the infliction upon her person of cruel and inhuman blows. Having the right to go to the premises of the deceased for this lawful purpose, he had the right to defend his own person, whilst there, from bodily injury.

The objection to the manslaughter instruction is, that it only follows the law as in ordinary cases of homicide, the jury being told that "if the killing was in a sudden affray, or in sudden heat and passion, produced by considerable provocation, such as a blow, an actual trespass to his person, then the jury should only find the accused guilty of voluntary manslaughter, and fix his punishment at confinement in the state prison for a term not less than two nor more than twenty years." It loses sight of the relation of these parties, and the right of the father to protect his child from the personal violence of the husband and to go even on his premises for that purpose; and when considering the instruction in regard to self-defense, this error becomes still more apparent.

In this case there was no blow or trespass to the person, but, from the testimony on the part of the state, the killing by the father was under the influence of sudden heat and passion, in the effort made, in good faith, to protect his daughter against the assaults of her husband. It is not necessary that a blow should be given, or a trespass committed on the person of the accused, in a case like this, to reduce the crime from murder to manslaughter. The true test is: "Whether the law deems the provocation calculated to excite the passions beyond control; if so, it reduces the offense from murder to manslaughter": Bishop's Crim. Law, 711. It is difficult to establish any rule defining the crime of manslaughter that will apply to every state of case, and hence the necessity of placing before the jury, in such a case as we have here, the right of the father to protect his child; for if a stranger had appeared upon the street, and taken the life of the deceased, not in self-defense, the crime could not be reduced to man-

slaughter upon the idea that he was provoked to take the life of the deceased because of the story of the wrongs perpetrated on the injured woman; nor could the father, unless impelled by passion created at the instant of time, have the offense reduced to manslaughter; but the law, in its wisdom, looking to the frailty of human nature, and the passions common to all men, where there is a sufficient provocation, will punish for the lesser offense; but, as said by Christiancy, J., in the case of *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 785: "Provocations will be given without reference to any previous model, and the passions they excite will not consult precedent."

Whether there has been time for the passions to subside, and the better judgment to prevail, must necessarily depend on the facts of the particular case. The father had long listened to the details of his daughter's wrongs; he knew that her life was endangered; that his own life had been threatened; and, meeting her husband at the moment when the daughter and children had been turned into the street, with angry words passing between them, he fired the fatal shot, it was, if in the absence of malice, under great provocation, and such as lessened the punishment, if there had been an absence of all proof as to self-defense. If a heinous offense should be committed on the person of a man's wife or his daughter, as said in the case referred to, the passion would hardly subside as soon as in the case of a sudden quarrel. All such questions are necessarily under the control of the court, and to be determined when evidence is offered in mitigation of the offense. Lord Hale states a case like this: A, the son of B, and C, the son of D, fall out, and fight; A is beaten, and runs home to his father, all bloody; B takes his staff, runs to the field, three quarters of a mile off, and strikes C that he dies. It was held not murder in B, but sudden heat and passion. East and Blackstone both cite this case; and while some of the elementary writers criticise this illustration of the rule, by saying that the blow was inflicted by a weapon not likely to produce death, it still serves to show the view taken of the question by the earlier writers on criminal law; and whether that decision turned upon the one question or the other is immaterial in determining the question presented here.

In this case, the jury returned a verdict of manslaughter, and it is therefore maintained that no error existed by reason of the failure of the court to instruct the jury as to the right of the parent to protect the child. It is impossible to say

what effect a proper instruction as to manslaughter would have had on the minds of the jury as to the duration of the punishment for the crime of which the accused was found guilty. It is manifest that under the instructions given, the appellant was either guilty of murder or entitled to an acquittal on the ground of self-defense; and if the question of provocation, caused by the beating of appellant's daughter, had been inserted in the instruction, the verdict as to the term of punishment might, and doubtless would, have been lessened. The jury should have been told, as a matter of law, that the father had the right to protect the person of his daughter from great bodily harm, even against the assault and battery of the husband; and further, that if they believed, from the testimony, the daughter of the accused, prior to the day on which the deceased lost his life, had been assaulted and beaten by her husband so as to endanger her life, or he had inflicted upon her person great bodily injury, and that the accused was appraised of that fact, and if they further believed that the assault and beating of the wife was renewed on the night of the 31st of May, and that he was informed of that fact, the accused had the right to arm himself, and go to the residence of the deceased to protect his daughter from the personal violence of the husband; and if, on reaching the place of trouble, he found his daughter and her children expelled from their home into the street by the deceased, and suddenly meeting with the deceased, in sudden heat and passion caused by the beating and ill-treatment of the wife from the appearances then surrounding them, shot the deceased when not in necessary self-defense, and without malice, he is guilty of manslaughter.

In ordinary cases of homicide, where the party kills when there is no reasonable ground for belief on his part of immediate danger of great bodily harm, the offense is murder. Not so when the husband pursues the adulterer and takes his life before there is time for his passion to subside, or the father flying to the relief of the child whose life has been endangered by the repeated cruelty of the husband. In all such cases the parent exercises no greater right than nature has assigned to the beasts of the field, that prompts them to fly to their offspring when in danger of bodily harm.

The error in failing to give such an instruction as the one indicated becomes the more apparent when considering the qualification annexed to the instruction in regard to self-de-

fense. That qualification reads, "Unless by his own wrongful act he made the harm or danger to himself necessary or excusable on the part of said Eady." What wrongful act had been committed by the accused is not developed by the testimony, unless it consisted in his going to the home of his daughter in order to protect her. The jury may have so considered it, and treated this case with no greater right on the part of the father to interfere for the protection of the daughter than if he had been an entire stranger to both the wife and husband. This qualification should be eliminated from the instruction, and while the jury, in the exercise of a humane feeling, have by their verdict lessened the rigor of the law as expounded by the court, nevertheless the appellant was entitled to have considered by the jury his rights as parent and the provocation that prompted him in the endeavor to protect his daughter from the cruel assaults of her husband.

The judgment is therefore reversed, and cause remanded, with directions to award the appellant a new trial, and for proceedings consistent with this opinion.

MURDER, WHAT REDUCES TO MANSLAUGHTER. — As to what will reduce murder to manslaughter, see *Oroom v. State*, 85 Ga. 718, *ante*, p. 179, and note.

MURDER — INSTRUCTIONS. — It is the duty of the court to instruct the jury upon the law applicable to every degree of the offense indicated by the evidence, no matter how slight such evidence may be: *Blocker v. State*, 27 Tex. App. 16. Yet, where there is absolutely no evidence tending to establish a certain degree of murder, no instruction need be given with respect to it: *State v. Munchrath*, 78 Iowa, 269; note to *Oroom v. State*, *ante*, p. 179. Where a defendant was convicted of manslaughter, upon a trial for murder, he cannot complain of a failure of the court to instruct as to the definition of manslaughter, if he did not ask for such an instruction: *Shubert v. State*, 68 Miss. 446.

MURDER — THREATS AS EVIDENCE. — See *Lery v. State*, 23 Tex. App. 203; 19 Am. St. Rep. 826, and note. Prior threats by the deceased against defendant are not admissible for defendant, unless some phase of the other evidence tends to show a case of self-defense: *Rutledge v. State*, 88 Ala. 85; *Hinson v. State*, 66 Miss. 532. Threats made by defendant against the deceased are admissible to show malice on the part of the defendant: *Babcock v. People*, 13 Col. 516; *Oleatham v. State*, 67 Miss. 335; 19 Am. St. Rep. 310, and note; *Pulliam v. State*, 88 Ala. 1; *Westbrook v. People*, 126 Ill. 81; notwithstanding no special connection is shown between the threats and the killing: *Baize v. State*, 88 Ala. 92; and although such threats were made long before the homicide: *Ortbe v. State*, 86 Ala. 613; *People v. Brown*, 76 Cal. 573. But there is no legal presumption that a killing is done in pursuance of a threat previously made by the accused against the deceased: *Boher v. People*, 129 Ill. 113.

HOMICIDE — One may repel force with force when he himself, or his wife, child, or servant, is forcibly attacked in person or property: Note to *Stanley v. Commonwealth*, 9 Am. St. Rep. 308; compare *Hay v. Commonwealth*, 85 Ky. 39; 9 Am. St. Rep. 260.

THOMAS v. IRELAND.

[88 KENTUCKY, 581.]

JUDGMENTS, CONCLUSIVENESS OF, WHEN BASED UPON FALSE RETURN. —

Where plaintiff acts in good faith in obtaining a judgment upon the return of a sheriff, indorsed upon the summons, that it was executed on the defendant, though in fact it was not, the return is conclusive as between the plaintiff and defendant. Such false return, though procured by one of the defendants, and that defendant the husband of the wronged defendant, will not justify setting aside the judgment as against the innocent plaintiff. The remedy is against the wrong-doers to recover damages.

JUDGMENTS — COLLATERAL IMPEACHMENT OF RETURN. — A sheriff's return, though false, cannot be impeached in a collateral proceeding for the purpose of setting aside or of getting rid of a judgment authorized by such return.

G. W. Williams and Son, and W. S. Roberts, for the appellants.

W. W. Ireland, and Miller and Morrison, for the appellees.

BENNETT, J. In 1880, upon the petition of J. B. Ireland and cross-petition of Joel Marshal against the appellants, the Hancock circuit court rendered judgment enforcing mortgage liens upon a tract of land belonging to the appellant Mrs. Thomas, which was executed by her and appellant J. C. Thomas to the appellees, J. B. Ireland and Joel Marshal. The return of the sheriff of Hancock County showed that summons was served upon both of the appellants in each case. The judgment was rendered by default, and the land was sold to satisfy the judgment, and purchased by Joel Marshal.

In 1885 the appellants instituted this action in equity against the appellee J. B. Ireland and the representatives of Joel Marshal, he having died, to set aside said judgment, upon the ground that summons was not served upon the appellant Mrs. Thomas to answer either the petition or cross-petition; that the return of the sheriff, showing that the summons on both petitions had been executed on her, which was false, was brought about by the appellant J. C. Thomas, who induced the sheriff not to serve the summons upon Mrs. Thomas, but to indorse the same executed upon her, in order to conceal from her the fact that her land was in danger of being sold to satisfy the mort-

gage debts, which were his and not hers, which conduct, it is alleged, was a fraud upon her. It is not alleged that the appellees J. B. Ireland and Joel Marshal, or either of them, were participants in this wrong-doing, or had any knowledge of it whatever.

It is well settled by this court that where the plaintiff acts in good faith in obtaining a judgment upon the return of the sheriff, indorsed upon the summons, that it was executed on the defendant, though in fact it was not, the return is conclusive as between the plaintiff and defendant. The stability of judgments requires this rule; otherwise judgments settling the rights of parties and giving remedies for the enforcement of these rights could never be regarded as permanent, but would be liable to be set aside, and the rights settled thereby be reopened, when the facts, not only appertaining to the service of the summons, but the merits of the controversy, had been forgotten or rendered unavailing by reason of the death of the parties or witnesses.

Of course, if the plaintiff induces the sheriff to make a return that he had served the summons, when he had not, whereby the plaintiff is enabled to obtain judgment against the defendant, the chancellor would not hesitate to set the judgment aside, upon the ground that it was fraudulently obtained; also, if he knew the sheriff had made a false return, and took judgment against the defendant notwithstanding, he would be regarded as an aider and abettor of the fraud, and the chancellor would set the judgment aside. But as long as the plaintiff is an innocent party, no false return of the sheriff, though procured by one of the defendants, and that defendant the husband of the wronged defendant, will justify setting aside the judgment as against the plaintiff. His protection lies in the fact that he is an innocent party.

When the plaintiff is an innocent party, the sheriff and his coadjutor, if he has one, are the wrong-doers, and the wronged party may have an action against them, or either, for damages commensurate to the injury he has sustained growing out of the wrongful act.

Also, as the sheriff is the wrong-doer, and not a party to the judgment, the proceeding to impeach his return is collateral; and it is well settled that his return cannot be impeached in a collateral proceeding for the purpose of setting aside or of getting rid of a judgment authorized by such a return: *Taylor v. Lewis*, 2 J. J. Marsh. 400; 19 Am. Dec. 185; *Smith v.*

Hornback, 8 A. K. Marsh. 892; *Sergeant v. George*, 5 Litt. 199.

The judgment is affirmed.

SHERIFF'S RETURN NOT COLLATERALLY AVAILABLE. — The misconduct of a sheriff in falsely returning process which he never served is not of itself sufficient ground for setting aside a judgment founded upon such false return: *Fowler v. Lee*, 10 Gill & J. 358; 32 Am. Dec. 172, and note. A sheriff's return is conclusive between the parties interested and their privies: *Studebaker v. Johnson*, 41 Kan. 326; 13 Am. St. Rep. 287, and note. But a sheriff's return may be impeached when the matters stated therein are not presumptively within his personal knowledge: *Great West Min. Co. v. Woodmas*, 12 Col. 46; 13 Am. St. Rep. 204; or where the service was procured by fraudulent and unlawful means: *Chubbuck v. Cleveland*, 37 Minn. 466; 5 Am. St. Rep. 864, and note. In *State Ins. Co. v. Waterhouse*, 78 Iowa, 674, it is decided that where a notice has been served upon an agent of the defendant, there being no statutory warrant for service upon such agent, no jurisdiction is acquired over defendant, and a judgment rendered upon such service is void.

RILEY v. LEE.

[88 KENTUCKY, 603.]

LIBEL — ADVERTISEMENT CHARGING FALSEHOOD. — A written or printed publication which tends to degrade or disgrace the person about whom it is written or printed, or which tends to render him odious, ridiculous, or contemptible in the estimation of his friends or acquaintances or the public, is, *per se*, actionable as libelous. Accordingly, the publication of a card in a newspaper, charging a person with having uttered a falsehood, is libelous *per se*.

LIBEL — MALICE IN LIBEL CONSISTS IN INTENTIONALLY PUBLISHING, without justifiable cause, any written or printed matter which is injurious to the character of another; and everything written and published of another that is injurious to his character must, for the purposes of the action, be taken to be false, until it is shown by plea and proof to be true; and the presumption of malice remains through the entire case until it is met by plea and proof of a contrary motive, or that the publication was justifiable.

LIBEL — GRAVAMEN OF LIBEL CONSISTS IN ITS PUBLICATION. Accordingly, the fact that a libelous card or advertisement was written by a person other than the publisher will not exonerate the latter from liability.

LIBEL — FREEDOM OF PRESS. — The constitutional guaranty of "the freedom of the press" is simply intended to secure to the conductors of the press the same rights and immunities, and such only, as are enjoyed by the public at large, in relation to criticising the acts of public officers and private individuals.

LIBEL — DEFAMATORY ADVERTISEMENT. — An advertisement proclaiming the defamation of a person's character, and averred to have been published without malice, as a matter of news, is not the subject of a lawful advertisement unless it is proved to be true, and in the absence of such proof, the publisher must answer in damages.

J. J. Landram, for the appellant.

Evan E. Settle, and Lindsay and Botte, for the appellees.

BENNETT, J. The appellant's petition and amended petition charge the appellees, as the owners and publishers of a newspaper known as the *Owenton News*, in Owen County, Kentucky, with having maliciously procured and published, for the purpose of defaming, degrading, and holding up to contempt and ridicule the appellant, a writing which was false, and known by them to be false, as follows:—

"Whereas O. V. Riley did make representations to me that it would be impossible for my sister, Bettie Threlkeld, to secure the position of teacher of the school in the Cedar Hill district, when, at the very time that he made this assertion, a *bona fide* contract with the trustees of said school had been made, in which she was positively engaged to teach said school; and whereas the disappointment occasioned by this misrepresentation of his caused my sister's mind to be sorely troubled during her late illness, causing her to despair, and assisting the ravages of disease to undermine her constitution, and further considering the fact that his sister had applied for the same school, — I regard this conduct in him as uncalled for, ungentlemanly, and detestable as his statement was fallacious.

[Signed]

"A. E. THRELKELD, M. D."

The lower court sustained demurrer to the petition and amended petition, setting up the foregoing matters. From this ruling the appellant has appealed.

The sole question to be determined is, Are the matters charged in the petition and amended petition libelous?

There is a material difference between slander and libel. Many things are actionable when written or printed and published that are not actionable if spoken, as the following cases show:—

In *Clement v. Chivis*, 9 Barn. & C. 172, it is said: "There is a marked distinction in the books between oral and written slander. The latter is premeditated, and shows design; it is more permanent, and calculated to do a much greater injury, than slander merely spoken."

In *McClurg v. Ross*, 5 Binn. 218, it is said: "Words are often spoken in heat, in haste, and with very little reflection or ill intention, and frequently forgotten or repented of as soon as spoken. But writing requires deliberation, and is therefore more injurious to the character attacked. We are apt to sup-

pose that before a man reduces an accusation to writing he has satisfied himself of the truth of it, and if he has not satisfied himself, his conduct is certainly very reprehensible. Besides, the scandal is more permanent and widely diffused. So that whether we consider the injury itself, or the mind of the person by whom the injury is committed, a libel is entitled to less allowance than a slander by words."

In *Stow v. Converse*, 3 Conn. 325, 342, 8 Am. Dec. 189, it is said: "It is because the imputations are written, and may circulate extensively, and never be forgotten, that the law respecting libel is so different as it is from the rules relative to verbal slander."

In view of the fact that newspapers, as the chroniclers of current events, public measures, and the acts of public men, are circulated everywhere, and read by all classes as seekers of such information, and which the publishers and editors endeavor to impress upon such readers are true, and which are false, but seldom rejected as absolutely false, but generally received as probably true, or as containing at least some truth; and as these papers are preserved for years and years, and whose attacks upon personal character may be reproduced at any time to wreck honorable old age, or be thrown in the teeth of his descendants in order to gratify personal spite or to subserve partisan ends,—the reason for the distinction between libel and slander, in reference to newspapers, is intensified.

The following cases illustrate the rule for libel as distinguished from the rule for slanderous words spoken:—

Cooper v. Tilney, 3 Salk. 225: "Scandalous matter is not necessary to make a libel; it is enough if the defendant induce an ill opinion of the plaintiff, or make him contemptible and ridiculous."

Villers v. Mousley, 2 Wils. 403: To publish a "writing of another which tends to hinder mankind from associating or having intercourse with him" is libelous.

Woodard v. Dawning, 2 Man. & R. 74: "That which tends to disgrace," if written and published, is a libel.

Forbes v. King, 1 Dowl., N. S., 872: "Undoubtedly, to write of a man what will degrade him in society is actionable."

Parmiter v. Coupland, 6 Mees. & W. 105: "A publication in writing, without lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is libelous."

Dexter v. Speer, 4 Mason, 115 (Judge Story): "Any publication, the tendency of which is to degrade or injure another person, or bring him into hatred, ridicule, or contempt, is libelous."

Nunn v. Winters, 2 Humph. 513: "Any writing or printing tending to injure the character of an individual, or diminish his reputation, is a libel."

Colby v. Reynolds, 6 Vt. 489; 27 Am. Dec. 574: "Any written publication concerning another that tends to render his situation in society uncomfortable and irksome, or tends to impair his standing in society as a man of rectitude and principle, or unfit for the society and intercourse of honorable and honest men, is libelous."

Rice v. Simmons, 2 Harr. (Del.) 417; 31 Am. Dec. 766: "A published writing which tends to disgrace a man or lower him in or exclude him from society is actionable."

In accordance with these cases is the case, decided by this court, of *McGee v. Wilson*, Litt. Sel. Cas. 187, which declares: "It does not follow that the libel is not actionable because words of a similar import, when spoken, are not so; for the rule with respect to written slander is different from that which prevails when it is only verbal. Words, to be actionable *per se*, when spoken of a person not in any office, trade, or profession, must imply the imputation of an offense which would subject him to punishment; but words when written, if they tend to degrade or disgrace, or to render odious or ridiculous, the person of whom they are written, will be libelous, and consequently actionable."

So it may be regarded as thoroughly settled that if the written or printed publication tends to degrade the person about whom it is written or printed,—that is, if it tends to reduce his character or reputation in the estimation of his friends or acquaintances or the public from a higher to a lower grade, or if it tends to disgrace him,—that is, if it tends to deprive him of the favor and esteem of his friends or acquaintances or the public, or tends to render him odious, ridiculous, or contemptible in the estimation of his friends or acquaintances or the public,—it is, *per se*, actionable libel.

Accordingly, to publish any writing or printing of a person, that he is guilty of falsehood, is libelous: *Cooper v. Stone*, 24 Wend. 484-441. Also, this court held, in the case of *Shelton v. Nance*, 7 B. Mon. 129, that the following language, written in a church book: "A report raised and circulated by William

Shelton against brother Nance, stating that he (Nance) made him (Shelton) pay a note twice, and proved by said Shelton to be false," — was libelous. In this case, as well as in the Cooper case, *supra*, the only charge against the party was that of having written a falsehood in reference to another, which was held, if untrue, to be libelous.

Truth is not only enjoined by the divine law, but the amity, happiness, and welfare of society are hinged upon it; and no man can or ought to enjoy a reputation as that of an honest and honorable man unless he speaks the truth on all occasions. Falsehood is degrading; it ought to degrade the man that tells it, and leave him a mere hulk, stranded on the outskirts of society; and to charge him with it certainly tends to degrade him.

In this case the substance of the card is, that the appellant, for the purpose of aiding his sister to procure the situation of teacher in the Cedar Hill district school, — Miss Bettie Threlkeld being an applicant for the same position, — uttered a falsehood in the interest of his sister, which card, according to the principles just discussed, is clearly libelous *per se*.

It is charged that this card was maliciously published, etc. Malice, in a case of this kind, consists in intentionally publishing, without justifiable cause, any written or printed matter which is injurious to the character of another; and everything written and published of another that is injurious to his character must, for the purposes of the action, be taken to be false, until it is shown by plea and proof to be true; and the presumption of malice remains through the entire case, until it is met by plea and proof of a contrary motive, or that the publication was justifiable.

The fact that the card was written by a person other than the appellees does not exonerate them from liability, for it is the publication that is the *gravamen* of the action. Nor can the appellees shelter, in a case like this, behind the "freedom of the press." By the provisions of the United States and state constitutions guaranteeing the "freedom of the press," it was simply intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large. The citizen has the right to speak the truth in reference to the acts of government, public officials, or individuals. The press is guaranteed the same right, but no greater right. The citizen has the right to criticise the acts of government, provided it is with the good motive of correct

ing what he believes to be existing evils or defects, and of bringing about a more efficient or honest administration of government. For like purpose and with like motive he may criticise the acts of public officials; and for the honest purpose of better subserving the public interest he may criticise the fitness and qualifications of candidates for office, not only in respect to their ability, fidelity, and experience, but in respect to their honesty and personal habits. The press has precisely the same rights, but no more. An individual may, in what he honestly believes to be in the interest of good morals and good order, and the suppression of immorality and disorder, criticise the acts of other individuals. So may the press. But in no case has the citizen the right to injure the rights of others, among the most sacred of which is the right to good name and fame; their rights are as absolute as his, and neither can injure the rights of the other. This negation extends to the denial of the citizen's right to speak, write, or print that which tends to injure the character or reputation of another, unless it is in fact true. The press is under the same restraints. As said, the *gravamen* of libel consists in its publication. If it be said the conductors of newspapers may publish as an advertisement what has been written by others, the answer is, that the conductors of the paper are presumed to know that the writing is an attack upon the character and reputation of another, which no one has the right to make unless the truth of the charge actually exists, and its publication in the newspaper not only gives the charge a more extended circulation, but gives it a permanent lodgment in the memory of the living, and it may be reproduced when all else concerning the person has been forgotten. Continuing the parallel, if the citizen, for wages, should proclaim and read a libelous writing from the street-corners, would the fact that he merely did it as a matter of business protect him? The answer is, No; for the reason that the good name of a citizen is too sacred to be let out on contract. So the answer to the conductors of the paper is, that the advertisement proclaimed the defamation of a person's character, which, unless true, is not a subject of lawful advertisement; consequently they must answer in damages. Also, in reference to publishing such writing without malice, as a matter of news, for the same reasons the answer comes back that it is not lawful to bruit, thither and yon, defamation of a person's character merely to gratify a morbid appetite for such scandal; that nothing short of the

truth of the matter published will be heard in justification of the unwarranted liberties thus taken with a person's good name.

But it is said that it would be a harsh rule to require conductors of newspapers to be responsible for the truth of the information that they furnish the public. The answer is, that the press must not be the vehicle of attacks upon the character and reputation of a person, unless the attack is known to be true; if it is not known to be true, do not publish it; the publication can seldom, if ever, do good, and the indulgence in publications of the sort, not strictly true, would soon deprave the moral taste of society, and render it miserable.

The judgment sustaining the demurrer to the petition and amended petition is reversed, and the case is remanded, with directions to overrule the same, and for further proceedings consistent with this opinion.

LIBEL. — As to what publications are libelous *per se*, see *State v. Brady*, 44 Kan. 435; *ante*, p. 296, and note.

LIBEL — MALICE. — For the definition of malice as applicable to actions for slander or libel, see note to *State v. Brady*, *ante*, p. 296.

LIBEL — MALICE. — Express malice is presumed, and need not be proved, when the words published are libelous *per se*: *State v. Brady*, 44 Kan. 435; *ante*, p. 296, and note.

NEWSPAPER LIBEL IS DISCUSSED AT LENGTH in an extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369.

LIBEL — FREEDOM OF THE PRESS. — For the meaning of the phrase "liberty of the press," see *McAllister v. Detroit Free Press Co.*, 76 Mich. 338; 15 Am. St. Rep. 318, and note 343, 344; compare *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

CITY OF NEW ORLEANS v. ORLEANS R. R. Co.

[42 LOUISIANA ANNUAL, 4.]

TAXATION OF CORPORATION. — No exemption of a particular corporation from taxation can be implied from the mere fact of the payment of a bonus by it for its franchise.

TAXATION OF CORPORATION — EXEMPTION. — No railroad or other corporation can claim exemption from taxation or from a license, simply because it has paid a bonus for its charter or franchise, in the absence of a stipulation on the part of the state or other taxing power that such bonus was received in lieu of any farther or future taxation.

Frank N. Butler, for the appellant.

W. B. Sommerville, assistant city attorney, for the appellee.

POCHE, J. The defendant corporation appeals from a judgment enforcing the claim of the city of New Orleans for a license of \$250 for the privilege of conducting the business of operating and running a street-railroad for the transportation of passengers within the limits of the city for the year 1888.

Its grounds of resistance are: 1. The unconstitutionality of act 101 of 1886, under which the city predicates its right to enforce the license under discussion, on the ground that the statute does not rate or grade licenses, in compliance with the provisions of article 206 of the constitution; 2. That by the terms of its contract with the city of New Orleans, the company had acquired its right to operate its road for and in consideration of the sum of ten thousand dollars, payable in five equal annual installments, and that thereby the city had exhausted its power to lay any further tax on the defendant's franchise.

The identical defenses were set up in the case of *New Orleans v. New Orleans City etc. R. R. Co.*, decided adversely to the defendant by this court last year, and reported in 40 La. Ann. 587.

On the present appeal, the defendant does not press the first point of its defense, as hereinabove stated. But its counsel solicits a reconsideration of our views on the second point of the controversy, and suggests that our conclusions on the question are antagonized by several decisions of the highest authority and respectability, which he submits for our consideration.

We have carefully examined those decisions, and we find in them no utterance or principle announced at variance with our reasoning in the case assailed as erroneous, but a great deal to establish and to confirm the correctness of our conclusions, to which we shall adhere. We shall now refer to the cases relied on.

The case of *Gordon v. Appeal Tax Court*, 8 How. 183, presented the attempt of the state of Maryland to levy a tax on the stockholders of a bank for their stock, in the face of a previous act of the legislature, which had accepted a bonus from the bank in lieu of taxation, and the supreme court of the United States held the state to its contract.

The *syllabus* reads: "Where the legislature of a state accepted from banking corporations a bonus as a consideration for the franchise granted, and pledged the faith of the state 'not to impose any further tax or burden upon them during the continuance of their charters under this act': held, that the tax upon the stockholders, by reason of their stock, was a violation of the contract, and the tax was illegal."

The following extract from the *syllabus* of the decision in *State Bank v. Knoop*, 16 How. 376, is sufficient to show that the case has no bearing on our present discussion: "The legislature of a state, if not restrained by its constitution, may make a valid and binding contract with a banking corporation, in its charter, that no more than a specified amount of taxes shall be levied on its property during a term of ten years; and a succeeding legislature has no power to pass a law impairing the obligation of such a contract."

The issue decided in the case of *Jefferson Branch Bank v. Skelly*, 1 Black, U. S. 436, is sufficiently stated in the following extract from the head-notes of the decision: "The charter of a bank is a franchise, which is not taxable as such, if a

price has been paid for it, which the legislature has accepted with a declaration that it is to be in lieu of all other taxation."

The Italics are ours, and the words thus emphasized actually demonstrate the striking difference between that and our case.

In the case of *New York etc. R. R. Co. v. Sabin*, 26 Pa. St. 242, the supreme court of Pennsylvania recognized in very clear language the legal difference between a bonus and a tax, which underlies our decision now under discussion, when it said: "It sometimes happens that a bonus is demanded and received from a bank or other corporation at the granting of its charter, and afterward all that class of corporations are expressly subjected to another rate of taxation. No exemption of a particular institution is to be implied from the payment of the bonus, for that would be to set up judicial implications against an express exercise of the taxing power."

In our case we are called on to set up a judicial implication of an exemption from a license for which there is not the slightest stipulation in the contract by which the company acquired a renewal of its expired franchise, simply for the reason that the contract stipulated the payment of a bonus for a valuable franchise for a term of twenty-five years.

It is a principle clearly deducible from the very decisions quoted by defendant's counsel, that no corporation can claim immunity from taxation or from a license because it paid a consideration for its charter or franchise, in the absence of a stipulation on the part of the state, or other taxing power, that the bonus was received in lieu of any further or future taxation. We therefore conclude that our former decision must remain untouched, and that this case was correctly decided below.

Judgment affirmed.

CORPORATIONS — TAXATION — EXEMPTION. — A bonus is the price paid for a franchise, or power of doing business as a corporation, and may be measured by the tax on the capital stock, or by a specific sum stipulated; but unless otherwise stipulated in the charter, the payment of a bonus no more exempts from taxation other property of the corporation than it does the dividends in the hands of the stockholders, or the real property which the corporation holds; *State v. Bank of Smyrna*, 2 Howst. 99; 73 Am. Dec. 520. and note.

NEWGASS v. CITY OF NEW ORLEANS.

[42 LOUISIANA ANNUAL, 188.]

MUNICIPAL CORPORATIONS — POWER TO ISSUE OBLIGATION TO PAY MONEY.

— A municipal corporation has no right as an incidental function to borrow money, issue negotiable securities or unconditional obligations to pay money, without express legislative sanction or irresistible implication. It may, however, issue warrants or orders negotiable in form and transferable by delivery or indorsement, but they are not negotiable paper in the hands of the holder so as to exclude inquiry into the legality of their issue, or to preclude defenses thereto.

MUNICIPAL CORPORATIONS. — CERTIFICATES OF INDEBTEDNESS issued by a

municipal corporation without express authority of law, and regularly filled in the name of its creditor or bearer, are not unconditional obligations to pay, and are not negotiable so as to pass title by delivery, especially when the ordinance under which they are issued is printed on and forms part thereof, and requires as a condition precedent to their issue that the party named therein sign a receipt therefor, which condition has not been complied with. In such case the question as to whether or not they were fraudulently issued, or the good faith of the holder for value, is immaterial. The holder takes them with notice of everything which appears thereon.

W. S. Benedict, for the appellant.

Francis B. Lee, assistant city attorney, *Carleton Hunt*, city attorney, and *Walter H. Rogers*, for the appellee.

BERMUDEZ, C. J. The question to be determined in this case involves the right of the plaintiff to recover from the city of New Orleans, as holder of certain certificates of indebtedness, issued by the comptroller and mayor, in the name of the city, under a certain ordinance, in favor of parties named therein, or bearer, and which on their face purport to be evidences of liability; in other words, whether such vouchers can be assimilated to ordinary promissory notes, state or municipal bonds, and such as can be recovered upon by holders in good faith and for value, etc.

Substantially, the answer is a denial of ownership in plaintiff and of the right to sue and a declaration of the worthlessness of the instruments, and the assertion, under any contingency, of the right of setting up equities destructive of the rights of plaintiff.

From a judgment of dismissal plaintiff appealed.

In April, 1881, and in June, 1883, ordinances Nos. 6968, A. S., and 347, C. S., were adopted by the city council of New Orleans, authorizing the issuance of certificates of indebtedness to certain creditors of the city, to be signed by the comptroller and the mayor.

They are to the effect, —

1. That any creditor of the city to whom the appropriation has been made, but in whose favor the comptroller cannot draw a warrant until there be money in the treasury to the credit of the appropriate account not otherwise appropriated, shall be authorized, upon demand, to receive a transferable certificate of ownership entitling him or bearer to receive a cash-warrant;

2. That the creditor shall sign a receipt therefor, stipulating that the cash-warrant shall be claimed only on the surrender of the certificate, and the acceptance of the warrant shall be an acceptance of the conditions of the ordinance;

3. That the warrant shall issue strictly in the order of the promulgation of the appropriating ordinance;

4. That the certificate shall not novate or affect the nature of the claim, but shall be simply an evidence of transferable ownership;

5. That the certificate shall state upon its face the nature and effect of its issue, with numbers, dates, and names, and that upon its reverse the ordinance shall be printed.

Ordinance 347, C. S., contains the form of the certificate mentioned in it, and which reads as follows: —

"OFFICE OF THE COMPTROLLER.

"Certificate of Ownership of Appropriation.

"Issued under Ordinance No. 347, C. S., approved June 26, 1883.

"NEW ORLEANS, —, 188—.

"This is to certify that under ordinance No. —, adopted —, 188—, the sum of \$—— has been appropriated to —— for and on account of ——, and the said ——, or bearer hereof, shall, upon the surrender of this certificate (and not otherwise), be entitled to receive, in the order of the promulgation of said ordinance, a cash-warrant on the treasurer on any fund in the treasury to the credit of the appropriate fund, and not otherwise appropriated.

"It is herein specially agreed to by the holder of this certificate that it bears no interest, and shall not novate, nor in any manner affect, the nature of the claim against the city under the ordinance referred to, but shall be simply an evidence of transferable ownership thereof; and whenever the ordinance, or that portion of it to which this certificate applies, is paid or canceled by being tendered and received in payment of taxes

when authorized by law, then this certificate shall be surrendered to the office of the comptroller.

"—, Comptroller.

"—, Mayor."

The certificates sued on are in that form, and bear on their reverse a copy of the ordinance. Naturally, the blanks are filled up.

The right of municipal corporations to borrow money and to issue negotiable securities has frequently been questioned; and although judicial adjudications on the subject may have considered it from different stand-points, recognizing or denying it according to circumstances, it may now be admitted as settled that they can do neither without express legislative sanction or irresistible implication.

After reviewing all the authorities on the subject, Mr. Dillon says that he regards it as the true doctrine that, as incidental to the discharge of its ordinary corporate functions, no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value, from equities which attach to its inception; and he adds that this point should be guarded by the courts with the utmost vigilance: *Dillon on Municipal Corporations*, sec. 126.

The consequences of recognizing such a power, in the extravagance it will stimulate, in the frauds it will engender, and in the ruinous indebtedness it will inevitably produce, are alarming to contemplate: *Id.*, sec. 125, par. 2.

Further on, he says that although warrants or orders negotiable in form may be made by the proper municipal officers, and in many states may be transferred by delivery or indorsement, and the holder may sue thereon, yet they are not commercial or negotiable paper in the hands of holders, which exclude inquiry into the legality of their issue, or preclude defense thereto. They are not bills of exchange: *Id.*, sec. 487. Such warrants and orders are not intended to have the qualities of negotiable paper, but are instruments authorized for convenient use in conducting the current or ordinary business of the corporation, and as a means of anticipating its ordinary revenue. It would overwhelm municipalities with ruin to hold that they protect an innocent holder for value from defenses of which he has no notice, actual or constructive. All holders of such orders, even when payable to bearer, stand in

the shoes of the payee, and the rights and remedies are essentially different from those of the holders of authorized negotiable municipal bonds. Such is the sound doctrine and such the authorities, almost without exception: *Id.*, sec. 503.

In the case of *Mayor v. Ray*, 19 Wall. 477, it was said that vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, and for liquidating the amount legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes; but to invest such documents with the character and incidents of commercial paper as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal corporation into a trading company, and puts it in the power of corrupt officials to involve a political community in inevitable bankruptcy. No such power ought to exist, unless conferred by legislative enactment, either express or clearly implied. Every holder of a city order or certificate knows that, to be valid or genuine at all, it must have been issued as a voucher for city indebtedness. It could not lawfully issue for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification.

The face of the paper itself is notice to him that its validity depends upon the regularity of its issue.

The officers of the city have no authority to issue for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers, or people. Persons receiving it from them know whether it issued and whether they receive it for a purpose and a proper consideration. Of course, they are affected by the absence of these essential ingredients, and all subsequent holders take *cum onere*, and are affected by the same defect.

This ruling is in perfect accord with what the same court had shortly before held: See *Police Jury v. Britton*, 15 Wall. 586; see also *Parsons v. Monmouth*, 70 Me. 262.

In this state, instruments of such character have been declared not to be commercial or negotiable paper: *Board etc. v.*

Hernandez, 31 La. Ann. 161; *State ex rel. Daunoy v. City*, 52 O. B., fol. 289; *State ex rel. Newman v. Lusher*, 50 O. B., fol. 571.

It is therefore patent that whatever the form be, the certificates sued on, they are not negotiable and transmissible, as is claimed by the plaintiff.

A simple inspection of them suffices to justify this conclusion.

They are instruments consisting of face and reverse, which must be read as one, in each instance, from the eight corners.

Although they purport to be certificates of indebtedness in favor of creditors of the city, in whose favor an appropriation has been made by a designated ordinance, they are not unconditional obligations to pay money. They refer to the ordinance under which they were prepared, and which, printed on the back, forms part of them; they give the name of the creditor entitled to receive same, whose name must be on the city's books; they show that they cannot be uttered unless the receipt mentioned in the ordinance be first given; they are simply, under the terms of the ordinance, evidence of transferable ownership; they do not call for money on presentation; they fix no time for maturity; they are merely convertible into a cash-warrant, and subjected to other contingencies, useless to specify. They are not indorsed by the party whose name they contain, or by any agent or transferee of his. They are not even conditional obligations to pay any amount. How, then, can it be claimed with any sincerity that they can be assimilated to ordinary notes and bonds?

For the purposes of this controversy it is immaterial how they left the hands of the city officials who signed them, whether fraudulently or otherwise, and whether the plaintiff is, or not, holder in good faith for value, and in due course of business.

From the very language of the ordinance, which forms part of them, they could not have been uttered by the city officers authorized to emit them, unless the parties to whom they accrued had previously signed therefor, as a condition precedent for delivery, a specific receipt containing certain stipulations, as parts of a new contract.

There is no evidence that such receipt was ever signed by the parties named in the certificates, their agent or transferee; so that even if the certificates were obligations to pay, which they are not, their emission to the creditor could have vested title in him to them only on his signature of the re-

ceipt, and this formality having been imposed as a prerequisite by the ordinance printed on the back of the certificates, and forming part thereof, and not having been observed, the ownership of the certificates would not pass to plaintiff.

To all intents and purposes, those certificates are in legal contemplation still in the possession of the city, subject to the order or receipt of such parties, their agent or transferee; so much so that if the city were to satisfy the demand of plaintiff the original parties might have cause to complain, and require another payment to themselves.

Surely, the plaintiff in this case has no greater rights than the parties whose names the certificates bear. Conceding that those parties have either signed the receipt in question, or indorsed over the certificate in blank to the plaintiff, it does not follow that the plaintiff would be entitled to the money judgment which he seeks, for the obvious reason that the parties named in the certificates could not themselves have obtained it, inasmuch as, under the ordinance, which forms part of the certificate, all that the creditor could claim would be a warrant on the treasurer, to be paid out of the appropriated fund in the city coffers, in the order stated in the ordinance.

The demand is not for any such warrant, and if it were it could not be allowed, as there is no evidence that there is money in the treasury appropriated to the payment of the debt or claim for which the warrant would have issued.

Judgment affirmed.

MUNICIPAL CORPORATIONS, POWERS OF. — The legislature may delegate certain powers to municipal corporations: *People v. Baltimore etc. R. R. Co.*, 117 N. Y. 150; such as the power to issue bonds: *Smalley v. Yates*, 41 Kan. 550; *Fulton v. Riverton*, 42 Minn. 395; to pay debts contracted by legal authority: *Rushville G. Co. v. Rushville*, 121 Ind. 206; 16 Am. St. Rep. 388, and note; *City of Alma v. Lockr*, 42 Kan. 368. But municipal bonds are always subject to the conditions upon which they were issued: *Eddy v. People*, 127 Ill. 428. In *State v. Benton*, 26 Neb. 154, it was decided the cities of the second class have no power to issue bonds in payment of work done in guttering intersections of streets.

MUNICIPAL CORPORATIONS CAN EXERCISE NO POWERS not expressly granted them by legislative authority or necessarily implied therefrom: *Village of Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490, and note; *Wells v. Town of Salina*, 119 N. Y. 281; *Russell v. Tate*, 52 Ark. 541; 20 Am. St. Rep. 193, and note. Municipal corporations do not have the general power of borrowing money for municipal purposes: *Wells v. Town of Salina*, 119 N. Y. 285, in which case is a collection of authorities upon the question of the power of municipalities to borrow money. Compare *President etc. v.*

Mayor etc. of Chillicothe, 7 Ohio, 31; 30 Am. Dec. 185, and note 190-194, as to the implied power of a municipal corporation to borrow money. See also *Mills v. Gleason*, 11 Wis. 470; 78 Wis. 721, and note.

MUNICIPAL CORPORATIONS. — As to the power of the legislature to delegate authority to municipal corporations, see note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 632, 633.

BROWN v. TEXAS AND PACIFIC R'y Co.

[42 LOUISIANA ANNUAL, 360.]

RAILROADS — RIGHTS AND OBLIGATIONS AT HIGHWAY CROSSINGS. — Where a railroad crosses a highway on the same level, those traveling on either have a legal right to pass over the crossing, and to require due care on the part of those traveling on the other, to avoid a collision. The train, however, has the preference and right of way, but is bound to give due warning of its approach, so that a wagon on the highway may stop, and it is bound to use every exertion to stop if the wagon is inevitably in the way. Hence it is negligence on the part of the railroad company to fail to give such warning by sounding the engine whistle at the distance from the crossing required by the rules of the company.

RAILROADS — COLLISION — NEGLIGENCE IN FAILING TO LOOK AND LISTEN. — One who is traveling on a highway, and crossing a railway track on a common level, is bound to exercise ordinary care and due diligence under all circumstances, to ascertain whether a train is approaching and to avoid a collision; and if before attempting to cross, and being in possession of all his senses, he fails to look and listen, he is guilty of such contributory negligence as will preclude his recovery for an injury sustained from a collision with the train.

RAILROADS — NEGLIGENCE OF COMPANY WILL NOT EXCUSE NEGLIGENCE OF HIGHWAY TRAVELER IN FAILING TO LOOK AND LISTEN. — The neglect of a railroad engineer to sound the whistle or ring the bell on nearing a highway crossing will not relieve a traveler on the highway from the necessity of taking ordinary precautions for his safety, nor will it excuse his contributory negligence in failing to look and listen before attempting to cross the railroad track.

Howe and Prentiss, for the appellant.

R. N. Sims, G. A. Gondran, and A. Talbot, for the appellees.

POCHE, J. This is an action in damages by the father and the mother of one Elizé Brown, for the death of the latter which resulted from a collision between a passenger train of the defendant company and a plantation cart driven by the deceased.

The defense is a general denial, and the plea of contributory negligence.

The railroad company appeals from a judgment of ten thousand dollars, based on the verdict of a jury.

The accident occurred on the 6th of March, 1889, at about two o'clock, P. M., on a large sugar plantation situated on the Mississippi River, extending to the rear between lateral lines, and which is crossed from one of said lines to the other by the road-bed.

There are on the plantation several roads, extending from the front to the rear thereof, which cross the railroad, and which are elevated at each intersection to a height sufficient to reach the level of the road-bed, so as to facilitate the passage over the same.

On that day the deceased, Elizé Brown, who was a laborer on that plantation, was engaged in hauling seed-cane from the front to the rear of the field, and in that work he had to use one of the roads which intersected the track as hereinabove stated. The cart which he drove was hitched to four mules, two leading together, and two together as wheel-mules, one of the latter being ridden by the driver.

As a special passenger train, running from New Orleans west at the rate of thirty miles an hour, approached that plantation, Brown, the deceased, was driving his empty cart from the rear or swamp side of the railroad to the front or river side of the plantation, and as his team was in the act of crossing the track, the collision occurred, by which three of the mules were killed outright, and by which he received the injuries which caused his death, some fifty hours later. Plaintiffs' theory of the case is, that the accident is attributable exclusively to the fault of the company and of its employees, and that the deceased is entirely free of any charge of negligence or want of proper care in the premises.

Their contention is, that it was gross negligence on the part of the engineer to have failed to blow his whistle at one quarter of a mile before reaching the crossing, as he was required by the rules of the company, and for failing to give any other warning of the approach of his train, which was an extra train, running and passing at that point at an unusual hour, at which time no trains of any description, or in any direction, were due according to schedule.

They further contend that for these same reasons the deceased, whose work necessitated his frequent crossing of the railroad track, and who knew no train was to be expected from New Orleans before late evening, and that the first train due on that day was to come from an opposite direction, on its way to New Orleans, and would be due only at

3:30 in the evening, was not held to a greater degree of care and caution than that which he had exercised on the occasion.

On many of the questions of fact involved in that contention, the evidence is very conflicting.

But the preponderance of the testimony in the record is to the effect that as Brown approached the railroad track he was driving his team at a slow trot, but as he began to ascend the elevation leading to the crossing, his mules moved at a walk, which was their gait when struck by the engine.

He was looking straight ahead, and he did not see the train or hear its noise.

When he was at a short distance from the track he was seen by the fireman, who had just then taken his seat on the same side of the engine as that on which the team was moving, having a moment before been engaged in putting coal in the furnace.

As soon as he saw Brown he began to ring his bell, and observing that the latter was still approaching the track, he sang out to the engineer that a team was approaching; but Brown was then only about ten feet from the track.

The engineer, who sat on the opposite side of the engine, the regular place of that employee, did not, and says that he could not, see Brown, on account of the intervening boilers, and he saw only the two lead-mules, and that only at the moment of the collision. On the warning of the fireman, the engineer at once sounded his whistle, applied the air-brakes, and reversed his engine. But it was too late, and the collision occurred.

It is admitted by the engineer in his testimony that he did not sound his whistle one quarter of a mile before reaching the crossing at which Brown was struck, and that his only alarm whistle was sounded at about half a mile distant from that point, and that it was really the whistle for a platform on the adjoining plantation.

That testimony, therefore, goes a great way to fasten proof of negligence on the engineer, who is thus shown to have neglected or failed to comply with the rule of the company itself, by which he was required to have sounded his whistle at a quarter of a mile before reaching the crossing at which the accident occurred.

But the question is yet open as to the contributory negligence charged to the deceased.

It is in proof that the road-bed was elevated about four feet

above the level of the surrounding fields; that at that season of the year there were no plants growing or grown, no weeds or undergrowth of any kind, or other obstacle, to obstruct the view of the road, which lay high and clear, open to uninterrupted view for at least half a mile either way from the crossing. The whole scene was in a large, open field in full cultivation, without the slightest obstacle to noise or sound; and it was on a clear day, with sunshine, at about two o'clock P. M., that the accident occurred.

It is therefore clear and unquestionable that the deceased was in no way deprived of every facility to see the approaching train, or to hear the loud noise made by it in its rapid motion at the rate of thirty miles per hour.

But it is in proof, and it is not denied by plaintiffs, that as he approached the road, and before attempting to cross it, Brown looked right straight ahead, without turning his eyes either way, although his mules slackened their gait as soon as they reached the elevation hereinabove described, which was at least a reminder of the proximate crossing.

It is no answer to this suggestion to say that the train was a special train, running at an unusual and an unexpected hour. It is in proof that special or extra trains were not of unfrequent occurrence on that road. And common prudence would dictate to any ordinary man that a train might be expected at any time on a railroad of vast extent in full and active operation, especially at its busy season, as was the case here.

The relative duties of persons in charge of trains on railroads, and of travelers who have occasion to cross such railroads, are well defined in jurisprudence, and are thoroughly understood in all American courts.

And we commend our learned brother of the district court for having adopted and embodied in his charge to the jury the following simple and clear exposition of those rights and duties, made by the supreme court of the United States in the case of *Continental Imp. Co. v. Stead*, 95 U. S. 161: "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by

means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. . . . On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and due diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen, and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them, — such, namely, as an ordinary prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation, even though the railroad company be in fault. They are the authors of their own misfortune."

In another case, the same exalted tribunal announced practically the same principle in the following language, as condensed in the *syllabus* of the case of *Chicago etc. R. R. Co. v. Houston*, 95 U. S. 697: "The neglect of an engineer of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses, to listen and to look, in order to avoid any possible accident from an approaching train."

In his work on contributory negligence, Beach, culling the same rule from "a multitude of decisions," formulates the doctrine thus:—

"When one approaches a point upon the highway, where a railroad track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption": Beach on Contributory Negligence, sec. 63, p. 191.

"In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track."

"Statutes and municipal ordinances in every jurisdiction prescribe specifically the duty of railway corporations in respect to railway crossings; but no failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing upon approaching a railway crossing, and whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence, without any reference to the railroad's failure to perform its duty": Beach on Contributory Negligence, sec. 64, p. 195. See also Wood's Railway Law, 1312; *Salter v. Utica etc. R. R. Co.*, 75 N. Y. 281; *Murray v. Pontchartrain R. R. Co.*, 31 La. Ann. 492; *Childs v. New Orleans City R. R. Co.*, 33 La. Ann. 154; *Houston v. Vicksburg etc. R. R. Co.*, 39 La. Ann. 796; *Weeks v. New Orleans etc. R. R. Co.*, 40 La. Ann. 800; 8 Am. St. Rep. 560.

As applied to the case in hand, this reasonable rule required that Brown, in attempting to cross the railroad track, should have looked up and down the track; by so doing he would inevitably have seen the train, which was in full view for nearly a mile, without the slightest obstruction. And that obligation is not affected by the fact that the train was a special or extra train; that circumstance may have mitigated the degree of his negligence, but it could not screen his conduct from the imputation of some negligence. Had he listened as he approached the crossing, he would certainly have heard the train as it thundered along in the open field at the rate of thirty miles an hour, with no obstruction to sound, and making a noise which one of the witnesses compares to that made by "a drove of cattle going across a bridge."

It is in proof that one of plaintiffs' witnesses, who was half a mile off, that another, who was at a distance of one hundred yards, a third, who was three hundred yards off, and a fourth, who was at a distance of several hundred yards, and who was walking toward Brown, on the same road and on the opposite side of the track, all saw and heard the train before the accident; and that the attention of one of them was attracted to the train by the noise which it made.

There is no pretense that Brown was defective in hearing, or near-sighted, and it is passing strange that he should have neither seen or heard the approaching train. Plaintiffs' coun-

sel suggests that his mind was absorbed in thoughts about his work. This is very probably the case, and it turns out to have been his misfortune, and the loss of his parents; but it is legal negligence, which clearly contributed to the deplorable accident which cost him his life, and which is a bar to plaintiffs' right of recovery in this case.

It was negligence on the part of the engineer to have omitted to sound the whistle at a quarter of a mile before that crossing; but that omission did not render the accident inevitable, if, on the other hand, Brown had been sufficiently prudent and careful when he approached the crossing.

It is in proof that his mules came from a slow trot to a walk at about twenty feet from the track. Had he seen or heard the train, it was yet time, and it would have been easy for him to have stopped his team, and thus have avoided the accident.

When the train-hands first saw him, they used every means in their power to avoid the collision; but it was no easy matter to stop a train moving at the rate of thirty miles an hour, and there was no obligation on the part of the company to slacken the speed of its trains at the numerous plantation cross-roads intersected by its track. When the fireman first saw Brown, he rang the bell, and he naturally supposed that the team would be stopped before reaching the crossing; but as the team kept on approaching, the engineer, who could not see Brown from his place, was then warned, and he applied the brakes and reversed his engine; but it was too late. At that point, nothing more could have been exacted of them. We therefore conclude that Brown's negligence or want of care contributed to the accident, and that therefore his parents cannot recover in the present action.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the verdict of the jury be set aside, and that plaintiffs' demand be rejected, and their action dismissed, at their costs in both courts.

RAILROAD COMPANIES, DUTY OF, AT PUBLIC CROSSINGS. — As to the duty required of a railway company towards one who may be approaching the track at a public crossing, see *Heddes v. Chicago etc. R'y Co.*, 77 Wis. 228; 20 Am St. Rep. 106, and note 114, 115.

RAILWAY CROSSINGS, DUTY REQUIRED OF PERSONS APPROACHING. — One who is approaching a railway crossing is bound to use the care of a prudent man, such as stopping, looking, and listening for approaching trains: *Cincinnati etc. R'y Co. v. Howard*, 124 Ind. 280; 19 Am. St. Rep. 96, and note; note to *Heddes v. Chicago etc. R'y Co.*, 20 Am. St. Rep. 114, 115.

YOUNG v. UPSHUR.

[42 LOUISIANA ANNUAL, 362.]

JUDGMENTS, WHEN BINDING ON NON-RESIDENTS WITHOUT PERSONAL SERVICE. — An action by a citizen of one state in a court of another state against a citizen of another state, by which plaintiff claims title to an undivided one-half interest in joint ownership with defendant in a judgment concerning property, rendered in the court where the present suit is brought, but which is pending on writ of error in the supreme court of the United States, is substantially a proceeding *in rem*; and an exception to the jurisdiction of the court *ratione personæ*, tendered by a curator *ad hoc* appointed to represent the absent defendant, on the ground that the latter has not been personally served, is not good. Substituted service by citation is effectual in such case, and the judgment rendered thereon will bind the absent defendant as to the property specially affected thereby.

Wade R. Young, in propria persona, for the appellant.

Hugh Tullis, curator ad hoc, for the appellee.

WATKINS, J. The plaintiff, claiming to be the owner of an undivided one-half interest in a certain judgment rendered by this court on appeal from the parish of Tensas, in the suit entitled *Mrs. Annie M. Upshur et al. v. Mrs. Mary E. Briscoe et al.*, by purchase from the plaintiffs therein, who are citizens of the District of Columbia, and which is still pending on writ of error in the United States supreme court, complains, —

1. That in the notarial act of transfer said plaintiffs, as transferrers, bound themselves not to interfere with her as the transferee of an interest therein, in the conduct and management of said suit, in any manner; 2. That said vendors and transferrers refuse to execute and comply with their agreement, and disavow their title so made, and contrary to their obligation, are attempting to effect a compromise of the matters in litigation, in violation thereof and to her great injury. Therefore she instituted suit in the parish of Tensas, and prays for a judicial recognition and enforcement of said contract of sale and her ownership of one undivided half-interest in said judgment.

The defendants being absentees in the sense of the Revised Civil Code, 3556, No. 3, the court granted an order appointing for them a curator *ad hoc*, in pursuance of the provisions of article 56 and corresponding provisions of the Code of Practice, upon whom substituted service of citation was made. The curator excepted to the jurisdiction of the court *ratione personæ*, on the ground that defendants have not been cited personally,

and have not been brought into court by any process of the court issuing against property of theirs within its jurisdiction.

This exception was sustained, the suit dismissed, and the plaintiff has appealed.

The question is, whether this proceeding constitutes judicial process within the meaning of the Fourteenth Amendment to the federal constitution. The leading case is *Pennoyer v. Neff*, 95 U. S. 780. In that case the supreme court announced the governing principle to be, that substituted service of citation "is effectual only when, in connection with process against the person for commencing the action, property in that state is brought under the control of the court and subjected to its disposition by process adapted to that purpose, or when the judgment is sought as a means of reaching such property, or (of) affecting some interest therein; in other words, when the action is in the nature of a proceeding *in rem*": Page 733.

Then proceeding to specify what, in that sense, a proceeding *in rem* is considered to be, the court say: "It is true that in a strict sense a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, when the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem*, in the broader sense we have mentioned."

As preparatory to the utterance just quoted, the court said: "Such service may, also, be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract, or a lien respecting the same, or to partition it among different owners, etc. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But when the entire object of the action is to determine the personal rights and obligations of the defendants, that is, when the suit is merely *in personam*, constructive service is sufficient for any purpose": Page 327.

Within the "larger and more general sense" in which the court treated actions *in rem*, we think this action comes clearly.

It is not an action *in personam*. Its object is to obtain ju-

dicial recognition and enforcement of a specific interest in tangible property situated in the parish of Tensas, in this state. The defendants are averred to be the plaintiff's vendors, and joint owners of the property in question, and she complains that they are about to dispose of same to her prejudice, and in direct violation of their contract.

Evidently, judgment is sought for the purpose of reaching the property in question, or of affecting an interest therein, by enforcing a contract respecting same, within the meaning of that opinion. This appears conclusive in the light of the concluding part of it, in which the court was careful enough to announce that it was not their intention to say "that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, . . . and that judgments rendered upon such service may not be binding upon the non-residents both within and without the state."

On the face of plaintiff's petition, it appears that by virtue of defendants' sale to her of an interest in a judgment, they became joint owners thereof, and that their contract is enforceable in the courts of this state *quoad* that property.

Laughlin v. Louisiana etc. Ice Co., 35 La. Ann. 1185, is not a similar case. In that case we held that substituted service of citation was insufficient for the purpose of subjecting a foreign corporation, unrepresented by an agent in this state, to a personal action sounding in damages upon the simple averment that it owned property in this state. In that view we are still firm, and deem it perfectly consistent with the jurisprudence of this court as expounded by our predecessors, and that the jurisprudence is consistent with the principles of *Pennoyer v. Neff*, 95 U. S. 730.

Dupuy v. Hunt, 2 La. Ann. 263, was an action for the recovery of slaves, or their value, against two defendants; one a citizen of Mississippi, the other of Louisiana. The former was cited through a curator *ad hoc*, and he excepted on the grounds assigned here, and the court said: "If the absentee leaves his property without an administrator or agent, if it be attached at the suit of a creditor, or if an absentee becomes a necessary party to a suit between other persons lawfully in court, in furtherance of justice, the law authorizes a curator to be appointed

to represent him. There is something on which the jurisdiction of the court is based, and the judgment rendered would be within the recognized and ordinary prerogatives of the judicial power."

The principles stated in that case were substantially followed in many subsequent opinions, and notably in *Peterson v. McRae*, 3 La. Ann. 101; *Jelks v. Smith*, 5 La. Ann. 674; *Ackley v. Lyons*, 6 La. Ann. 648; *Ferguson v. Thomas*, 6 La. Ann. 218; *Prindle v. Williams*, 9 La. Ann. 34; *Stephens v. Graves*, 9 La. Ann. 239.

But in *Field v. New Orleans Delta Co.*, 19 La. Ann. 38, a departure was taken, the principles announced in the quoted cases being recognized, but misapplied to a strictly personal action. In the more recent cases of *O'Hara v. Booth*, 29 La. Ann. 817, *Morris v. Bienvenu*, 30 La. Ann. 878, and *Fly v. Noble*, 37 La. Ann. 669, those earlier cases were followed, and they are in keeping with *Pennoyer v. Neff*, 95 U. S. 730, to which our jurisprudence has been conformed; *McKenzie v. Bacon*, 38 La. Ann. 764; *Laughlin v. Louisiana etc. Ice Co.*, 35 La. Ann. 1184; *Heirs of McGehee v. McGehee*, 41 La. Ann. 657; *Duruty v. Musacchia*, 42 La. Ann. 357.

Our conclusion is, that the case stated is one in which substituted service of citation is effectual, and that a judgment pronounced thereon contradictorily with the curator *ad hoc* will bind the absentee defendant *quoad* the property in controversy, and that the judge *a quo* incorrectly sustained the curator's exception, and dismissed the plaintiff's suit.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the suit be reinstated, and the cause remanded for further proceedings according to law and the views herein expressed.

JUDGMENTS AGAINST NON-RESIDENTS. — As to what judgments are valid rendered against non-residents, see *Harris v. Daugherty*, 74 Tex. 1; 15 Am. St. Rep. 812, and note; *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34, and note; *Harris v. Pullman*, 84 Ill. 20; 25 Am. Rep. 416; *Ewer v. Coffin*, 1 Oush. 23; 48 Am. Dec. 587, and note; *Dearing v. Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300, and note; *Flint River S. S. Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 243, and note.

MEYERS v. MATHIS.

[42 LOUISIANA ANNUAL, 471.]

DEEDS — CONVEYANCE OF BATTURE OR ALLUVION RIGHTS. — A deed which describes the property sold as fronting on a certain street, and extending between certain lines to the river, without guaranty of measurement, conveys the batture or alluvion rights to the river frontage described in the deed.

DEED, WHEN CONVEYS BATTURE OR ALLUVION RIGHTS. — A deed describing the property sold as fronting on a river conveys the batture or alluvion rights without any provision to that effect contained in the deed.

Henry P. Dart, for the appellants.

Moise and Cahn, for the appellees.

BERMUDEZ, C. J. This is a suit to compel the defendants to comply with an adjudication made to them of certain real estate in this city for eleven thousand seven hundred dollars.

The defense is, that the title offered describes the lots as carrying the batture privilege, or right of accretion, when in truth the plaintiffs have no right thereto, for the reason that titles of their authors to them make no conveyance thereof.

From an adverse judgment the defendants appeal.

The property adjudicated, consisting of three contiguous lots, is described as situated in a square bounded by Jena, Water Street, Napoleon Avenue, and the Mississippi River, having a stated front on Water Street, and extending in depth to the waters of the river, together with all rights of batture or accretion, whether the same is now formed or hereafter to be formed, without any reservation whatsoever.

These lots were sold to the company represented by the plaintiffs, under the same description, by Widow Seiler, as universal legatee of her husband.

The latter's title, derived from the Millaudons, contains a description of the lots as bounded by Jena and Water streets, Napoleon Avenue, and the Mississippi River, fronting on Water Street, with a stated approximated depth, without any guaranty as to the measurement.

The property thus sold measured, each lot, some thirty feet front, on a depth of a little more than three hundred feet.

Accretions have since formed successively and imperceptibly to the first quantity of soil, by which the river water line was distanced by about six hundred feet.

The right of the Millaudons to the batture at the time of sale is not disputed.

The contention is, that as the deeds to Seiler are reticent as to the right to batture, and merely mention the river line as a boundary, all the accretions since formed have not inured to Seiler and his assigns; in other words, that the description given is an exclusion of land not described.

It is admitted that other lots above the avenue fronting on the river were sold at the same auction at which Seiler bought, to various purchasers, and that all the deeds, except Seiler's, contained an express mention of the right of batture being sold.

Jena Street and Napoleon Avenue run perpendicular, apparently, to the river. On Water Street, which runs parallel with, or in the same sense as the river, the levee existed at the time. Since, it has been removed therefrom, and built nearer the river, so that the land in controversy lies back of the old levee, to the river water line.

The only question presented is, whether the title made to Seiler carried with it a right to alluvion soil *in posse*, which now constitutes the six hundred feet mentioned.

The sale was by metes and bounds, as concerned the front and rear lines.

Had the titles to Seiler described the lots as measuring so many feet front on the river, between Jena Street and Napoleon Avenue, extending in depth to Water Street, on which the levee stood, there could have been little or no room for discussion; for it is settled beyond the possibility of a doubt that the words "front to the river," *frente al rio*, convey a riparian estate, and that under them the vendee is entitled to the river for his boundary: 6 Mart. (La.) 216; 18 La. 259; 9 Mart. (La.) 656; *Cambre v. Cohn*, 8 Martin, N. S., 596.

The ruling in the last-mentioned case, invoked by the defendants, itself recognizes the correctness of the doctrine. In expounding the law, the court said, however, that it is "not applicable to a sale made of a certain limited part, taken from a whole tract of land, when, at the time of sale, the vendor held in full property another part, between that sold and the river."

In the more recent case of *Ferrère v. New Orleans*, 35 La. Ann. 209, it was held that when property was sold fronting and ending on the levee, and not on the river, the sale embraced all the rights of property which the owner had in the premises up to, but not beyond, the levee, and therefore that the vendor had not conveyed the batture accretion or alluvion right. This case is but a corollary of previous ones.

The right to future alluvial formations is a vested right inherent in the property, thus: "The portion added is not considered as new land. It is part of the old, which acquires the same qualities and which belongs to the same owner, in the same manner as the increase by the growth of a tree makes part of the tree": 8 Martin N. S., 567; 18 La. 54; 13 La. Ann. 105.

In the present case, the sale is not of a certain limited part taken from a whole tract of land, and the vendors at the time of sale did not hold any other between that sold and the river.

The sale was from the levee then in existence on Water Street to the river, and included not only the soil actually susceptible of possession, but, besides, all such other as might be subsequently formed in the course of time, *labentibus annis*, or in addition, as an increment, to that conveyed.

It is to be observed that the measurement of the lateral lines is not fixed and determined with precision. It shows that it was not possible to do otherwise, precisely because the probability of accretions had entered into the minds of both vendor and purchaser. Hence it is that the act declares that the sale is made without guaranty as to measurement. The declaration is clearly indicative that the vendor was unwilling to be bound as selling a certain limited part which was not ascertainable, but designed to sell the property, such as it was and might thereafter be, in area.

Such being the case, what difference is there between selling front to the river, with a depth extending from it to a parallel or similar line, and selling front on such line, with a depth extending from it to the river?

In either case, the superficies would be the same, and the rights to the batture alike.

Under no conceivable contingency would the vendor pretend not to have sold the whole of it, and claim an inch of ground between the river and the street and the lateral lines, for the plain reason that, having divested himself of all title to the land comprised between the front and rear lines and the side limits, he could not be permitted to gainsay and repudiate his acts, and revendicate what has passed by his free volition from him to his vendee for due consideration.

There is no force in the contention that because at the time of the auction sale, at which Seiler acquired, other lots were sold to other purchasers, with the batture right expressly mentioned, and because such right was not thus mentioned in his deed, he did not acquire it.

The mention of the batture right as conveyed in the other title was surplusage. The omission of it from Seiler's title is innocuous. As the property sold to those parties extended to the river, as it did in Seiler's act, the purchasers would have acquired, as Seiler has, without such mention.

The conclusion is, therefore, that Seiler acquired not only the soil *in esse* at the time he purchased, but also the right of the batture or alluvion soil susceptible of formation *in futuro*; that his rights passed to his widow as his universal legatee, and from her to the company now represented by the plaintiffs as commissioners; and that the title offered by them to the defendants is such as they are bound to accept.

Judgment affirmed.

ALLUVION. — For the law applicable to alluvion, see note to *Hagen v. Campbell*, 33 Am. Dec. 276-280; *Leonard v. Baton Rouge*, 39 La. Ann. 275.

DEEDS — WATERS — BOUNDARIES. — As to the rights acquired by the grantee in a grant or conveyance of land bounded by a river or watercourse, see *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139, and note; *Miller v. Mendenhall*, 43 Minn. 95; 19 Am. St. Rep. 219; *Palmer v. Farrell*, 129 Pa. St. 162; 15 Am. St. Rep. 708; *Wiggenhorn v. Kountz*, 23 Neb. 690; 8 Am. St. Rep. 150; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; 8 Am. St. Rep. 679.

STATE v. HEIDENHAIN.

[42 LOUISIANA ANNUAL, 482.]

MUNICIPAL CORPORATIONS — CONSTITUTIONALITY OF ORDINANCE PROHIBITING SMOKING IN STREET-CARS. — An ordinance making it an offense for passengers to smoke while in street-cars, adopted by a city under its charter conferring authority to maintain good health and sanitary conditions and to suppress nuisances, is constitutional and valid.

MUNICIPAL CORPORATIONS — POWER TO ABATE SMOKING IN STREET-CARS. — A city, in the exercise of its legislative discretion, may determine what is a nuisance, and enact necessary ordinances to suppress it, and it may thus abate, as a nuisance, the act of smoking by passengers while in street-cars, as part of the police power vested in it.

MUNICIPAL CORPORATIONS — POWER TO DETERMINE WHAT IS NUISANCE. — The discretion exercised by a municipal corporation in determining what is a nuisance will not be judicially interfered with, unless the corporation has been manifestly unreasonable and oppressive, or has invaded private rights and transcended the power granted it. An ordinance prohibiting smoking by passengers in street-cars is not open to attack on either of these grounds.

E. Howard McCaleb, Girault Farrar, and Henry Heidenhain, for the appellant.

T. McC. Hyman, assistant city attorney, and Carleton Hunt, city attorney, for the appellee.

MCENERY, J. The defendant appeals from a conviction by the first recorder's court of the city of New Orleans for a violation of ordinance No. 4197, adopted January 2, 1890. For two distinct and separate violations of the ordinance he was for each violation sentenced to pay a fine of twenty-five dollars, or thirty days' imprisonment.

The ordinance is as follows: Whereas the custom of permitting smoking in the street-cars of this city is a most vile and objectionable one to the majority of our citizens, especially to the ladies, who are entitled to that courtesy and consideration due to their sex; and whereas this alone of all the cities of the Union allows such a discomfort to those of its citizens who ride in the public cars,—be it resolved that from and after the promulgation of this ordinance that smoking in any street-car of this city is hereby prohibited and shall hereafter be considered as a misdemeanor, and any one so offending, or any driver of a street-car who permits such an offense, shall be fined not less than five dollars nor more than twenty-five dollars, or imprisoned not less than five days or more than thirty days, recoverable by the recorder of the district in which the offense shall be committed; and be it further resolved that one half of any money thus recovered shall be the property of the party giving such information and testimony to the recorder as will lead to the conviction of the offender. Be it further resolved that all laws or parts of laws in conflict with the above be and the same are hereby repealed. Adopted by the council of the city of New Orleans January 2, 1890.

The defense is,— 1. The unconstitutionality of the ordinance; 2. That the city of New Orleans is without power or authority under her charter to pass such an ordinance; 3. That the ordinance in question is vague, indefinite, and insufficient in its terms, and does not define what acts shall constitute a violation or infringement; 4. That it imposes upon the drivers of street-cars duties and functions beyond the powers of the common council.

The ordinance does not deprive the defendant of personal liberty, nor does it invade any right of private property.

Smoking is not made an offense, but it is prohibited only in a certain designated place.

The third and fourth grounds are without merit. The ordi-

nance makes it specifically an offense to smoke in a street-car. The street-car drivers and car companies are not complaining of the ordinance.

2. The several street-railroad companies have adopted the above ordinance as a part of their regulations, and prohibited smoking in all their cars immediately after the passage of the ordinance. When the defendant entered the car, there was conspicuously displayed a card notifying him that smoking was prohibited in that particular car.

A nuisance belongs to "that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or to the right of another or of the public, and producing such material annoyance, inconvenience, or discomfort, or hurt, that the law will presume a consequent damage": Wood on Nuisances.

There is no doubt of the fact that smoking in the street-cars in the city of New Orleans had caused to the great majority of people using them material annoyance, inconvenience, and discomfort. This is particularly so in the winter season, when the cars are closed. There is not only discomfort, but positive danger to health from the contaminated air. The record establishes these facts.

Smoking, in itself, is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable, to those who have acquired the habit; but it is distasteful and offensive, and sometimes hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places.

There are many other habits in manners and conduct which in some localities and places are not objectionable to the public, but when committed elsewhere may become offensive and the subject of penal municipal legislation. Smoking may be classed among these subjects of legislation by the municipal corporation.

The police power delegated to the city of New Orleans in its charter gives ample authority to the city to maintain its cleanness and health; to maintain good sanitary conditions in the streets, public places, and buildings; to suppress all nuisances; and to impose a fine and imprisonment for the violation of ordinances created in pursuance of this delegated power: Act 20 of 1882, sec. 7.

The authority to abate nuisances is a part of the police power vested in all large and populous cities. To determine what is a nuisance is a question of fact.

The city council of New Orleans is, to a limited extent, clothed with legislative authority, and it is vested with that discretion, within its powers, common to all legislative bodies.

Within the exercise of this legislative discretion, it has the authority to determine what is a nuisance, and to enact the necessary ordinances to suppress it: *Kennedy v. Phelps*, 10 La. Ann. 227; *City of Monroe v. Gerspach*, 33 La. Ann. 1011.

Much is therefore left to the discretion of the municipal corporation in determining what is a nuisance; and the discretion thus exercised will not be judicially interfered with, unless the corporation has been manifestly unreasonable and oppressive, invaded private rights, and transcended the power granted to it: *Dillon on Municipal Corporations*, sec. 379.

In the instant case, no private right, either of person or of property, has been violated or invaded. The city council, in passing the ordinance, did not transcend its powers. It had authority, under section 7 of the charter, to provide for the public health. It can therefore require in public places, theaters, halls, etc., that there shall be ventilation for a supply of fresh and pure air; and in order to preserve the public peace, order, and health, and under its general police authority in said section 7, it can compel the owner of public halls and theaters to provide means to prevent fires, and to supply fire-escapes in case of fire. And in pursuance of the same power, it can, in order to preserve pure and fresh air in crowded halls, and to prevent fire, prohibit smoking in the same.

The same authority and the same reasons apply in the prohibition of smoking in street-railway cars.

It is as essential to health and to comfort to have pure air in them as in any other crowded place.

The facts in the case of *State v. Bright*, 38 La. Ann. 1, 58 Am. Rep. 155, have no application to this case. The former involved the question of the power of the city to punish a property owner for not keeping his sidewalk clean and in repair. This court decided that there was no authority for the city to declare the failure to raise and repair the sidewalks a misdemeanor, and fix a penalty to the same, as there was an absence of such authority in section 7 of the charter.

The city council had ample authority, under section 7 of the

charter, to enact the ordinance under which the defendant was convicted.

Judgment affirmed.

MUNICIPAL CORPORATIONS — ORDINANCES. — A city ordinance must be reasonable, tending in some degree to the accomplishment of the object for which the municipal corporation was created and its powers conferred: *People v. Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578, and note; note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 633-636; *Ward v. Mayor etc. of Greenville*, 8 Baxt. 228; 35 Am. Rep. 700, and note 702, 703; *City of Lake View v. Tate*, 180 Ill. 247. The city may pass ordinances to protect public health: *Louisville v. White*, 84 Ky. 290; *State v. Holcomb*, 68 Iowa, 107; 56 Am. Rep. 853; *Ex parte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640.

MUNICIPAL CORPORATIONS. — POWER TO DECLARE WHAT IS A NUISANCE: See *Easton etc. Ry Co. v. City of Easton*, 133 Pa. St. 505; 19 Am. St. Rep. 658, and note; *Town of Arkadelphia v. Clark*, 52 Ark. 23; 20 Am. St. Rep. 154, and note.

STATE v. DESCHAMPS.

[42 LOUISIANA ANNUAL, 567.]

CRIMINAL LAW — MURDER — PROOF NECESSARY TO ESTABLISH. — Simple proof of a homicide is insufficient to establish the crime of murder. The prosecution must first affirmatively prove the existence of malice in the perpetrator, in order to put him upon his defense.

CRIMINAL LAW — MURDER — PRESUMPTION FROM ACT OF KILLING. — When an act is committed deliberately with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; but the presumption which arises from a killing, unattended with such circumstances of violence, is that of murder in the second degree, or of manslaughter.

CRIMINAL LAW — MURDER — PROOF OF MALICE. — Malice may be inferred from many circumstances, other than the use of a deadly weapon, and since proof of it usually lies in circumstantial evidence, evidence of any facts which go to afford an inference of its existence is admissible.

CRIMINAL LAW — MURDER — EVIDENCE OF INTENT. — Where the *scienter* or *quo animo* forms an essential or indispensable part of the inquiry, testimony is admissible of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent, notwithstanding they may constitute a different crime in law.

CRIMINAL LAW — PROOF OF INTENT FROM DISTINCT CRIME. — Proof of a different crime from the one charged, though generally objectionable, is admissible when both crimes are closely linked or connected, especially in the *res gestæ*, and also when such proof is pertinent and necessary to show intent. When the intent is thus shown, further proof of premeditation is unnecessary.

CRIMINAL LAW — MURDER — INTENT PRESUMED FROM PERPETRATION OF ANOTHER FELONY. — A homicide committed by an accused while engaged in the perpetration of a felony, as rape or sodomy, is murder, and the

- absence of proof of premeditation or preconceived design to kill is insufficient to reduce the crime to manslaughter.

NEW TRIAL—INSUFFICIENCY OF EVIDENCE.—The appellate court will not revise the refusal of the lower court to grant a motion for a new trial, based solely on an alleged deficiency of evidence to make out the case.

Alfred Roman, for the appellant.

Walter H. Rogers, attorney-general, and *Lionel Adams*, for the state.

WATKINS, J. This is the defendant's second appeal from a verdict and judgment sentencing him to the extreme penalty of the law for the commission of the crime of murder: 41 La. Ann. 000.

The grounds on which the reversal of the judgment is demanded are: 1. That certain testimony was improperly admitted; 2. That the court below improperly declined to give certain requested special charges to the jury; and 3. That his application for a new trial was illegally refused.

1. The first bill of exceptions to which our attention is attracted is that in reference to the testimony of the coroner, who was called and interrogated as a witness on the part of the state.

The objections to the coroner's statement as a witness are: 1. That it is irrelevant to the issue; 2. "That its tendency was to prejudice the accused before the jury"; and 3. That it tended to establish the perpetration of another and different crime than the one charged against the accused, and which was not necessarily included therein.

To these objections the trial judge replied that "in all cases of homicide, even when it is not absolutely necessary to prove the condition of the body of the deceased in order to ascertain and determine the cause of the death, and the instrumentality, means, and agencies by which death was accomplished, such testimony is admissible to show whether or not the killing was by the use of means and agencies prepared in advance, and dangerous to human life. Such testimony is also admissible to show motive, and whether the killing, intentional or unintentional, was done while the accused was engaged in doing some other unlawful or felonious act." He therefore considered the testimony competent, and admitted it over defendant's objection and exception.

In thus ruling, we think the judge's decision was undoubtedly correct. The simple proof of a homicide is insufficient to establish the crime of murder. Some proof must be first

affirmatively made, on the part of the state, of the existence of malice in the heart of the perpetrator of the act, in order to put the accused upon his defense.

Ordinarily, when the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed. But as a general rule it has been held in different states that the presumption which arises from a killing, unattended with such circumstances of violence, is that of murder in the second degree. And as under our law there are no grades or degrees in the crime of murder, the simple proof of a killing by the accused, unattended by any circumstances of malice, could raise no stronger presumption against him than that of manslaughter: 2 Wharton's Crim. Law, sec. 952.

But there are many circumstances from which malice may be inferred, other than the use of a deadly weapon; and Mr. Wharton instances "prior attempts to injure, though in other ways": 2 Wharton's Crim. Law, sec. 954.

The same author says: "Since malice cannot usually be directly proved, and the evidence of it, therefore, being circumstantial, any facts which go to afford an inference of its existence are admissible": 2 Wharton's Crim. Law, sec. 956.

The same author announces the rule to be, that "where the *scienter* or *quo animo* forms an essential or indispensable part of the inquiry, testimony may be offered of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent, . . . notwithstanding they may in law constitute a distinct crime": Wharton on Homicide, secs. 701, 702.

Bishop puts the principle thus tersely: "The proof of criminal intent and of guilty knowledge, not generally admitting of other than circumstantial evidence, may often be aided by showing another crime attempted or perpetrated; and when it can be, it is permissible": 1 Bishop's Crim. Proc., sec. 1126.

In treating of what is admissible in proof of *res gestæ*, the same author says: "Therefore if two or more offenses are committed in one transaction, all the transaction—that is, all the offenses—may be given in evidence on the trial for one. And all the *res gestæ* may be shown, though the transaction is a continuing one, or done in parts on different days": Bishop's Crim. Proc., sec. 1125.

Our predecessors recognized and enforced this precept of criminal law in *State v. Patza*, 3 La. Ann. 512, the rule being

stated thus: "The general rule is, as stated by counsel for the accused, that no evidence can be given of other felonies committed by the prisoner than that charged in the indictment. To this rule, however, there are exceptions, one of which is where it becomes material to show the intent with which the act charged was done. Evidence may be given of a distinct offense not laid in the indictment." See also *State v. Thomas*, 80 La. Ann. 600.

We have maintained the right of the state to offer such evidence as is here objected to in a recent and conspicuous case (*State v. Vines*, 34 La. Ann. 1081), in which we said: "Proof of a different crime from the one charged, though generally objectionable, is admissible when both offenses are closely linked or connected, especially in the *res gestæ*, and also when such proof is pertinent and necessary to show intent": *State v. Mulholland*, 16 La. Ann. 377; *State v. Rohfrisch*, 12 La. Ann. 382.

On this summary of authority we can safely rest our conclusion as to the correctness of the ruling complained of by the accused.

2. The defendant's counsel requested several special charges, which were refused by the trial judge, which we will consider separately.

(a.) That no evidence tending to establish the commission of other offenses not connected with the charge of murder, and not growing out of such charge, should be considered by the jury in forming their verdict in this case.

To this request the judge responds that it proceeds upon the hypothesis that there was evidence before the jury tending to establish the commission of other offenses not connected with the charge of murder; but he says: "There was no evidence before the jury respecting the commission of any offense by the accused which was not connected with the charge of murder, and which did not tend to show that the killing was done while the accused was engaged in the commission of an offense which was a felony."

On this statement of fact, the requested charge would have been misleading and superfluous if made, and the judge properly refused to give it to the jury.

(b.) That should the jury believe from the law and the evidence that the accused, being of sound mind, caused the death of the deceased in an unlawful manner, though not against the will of the latter; and should the jury also believe that the

result of the defendant's act showed negligence or gross imprudence, but no premeditation, no preconceived design to kill, and therefore no malice on his part,—it would be the duty of the jury to find for manslaughter, but not for murder.

The judge declined to give this special charge, on the ground that it was not a correct exposition of the law; insisting, on the contrary, that if the killing was shown to have been done while the accused was engaged in doing an act which was itself a felony, the absence of proof of premeditation or preconceived design to kill the deceased is insufficient to reduce the crime to manslaughter. He supports that view by reference to his written charge, in which similar ground is taken, viz.: "If the jury believe from the evidence, and are satisfied, that the deceased came to her death from any drug, or potion, or intoxicant furnished by the accused for the purpose of depriving her of consciousness or volition, to enable him thereby to have either sexual or unnatural intercourse, and not for the purpose of causing death, yet if in the perpetration of such unlawful design death ensue, such act is murder."

This requested charge is but a supplement to the objection urged to the admissibility of evidence, discussed in paragraph 1; for if it be permissible, on a trial for murder, to show the guilty knowledge and criminal intent by making proof of the commission of another crime attempted or perpetrated; if more than one offense may be proved to have been committed by the accused, when the two transactions constitute parts of the *res gestæ*; if it be an exception to the general rule that where it becomes material to show the intent with which the act charged was done, evidence may be given of a distinct offense, not laid in the indictment,—what becomes of the proposition that other proof of premeditation should be administered in order to make out a case of murder?

As we understand the proposition argued and determined, it is, that such proof is admissible for the purpose of showing premeditation and malicious intent; or that if offered and received, the proof of the commission of such contemporaneous crime, forming, as it does, a part of the *res gestæ*, would be accepted as sufficient proof of malice. Certainly, no argument can be required in support of the proposition that a homicide committed by an accused while he is actually engaged in the perpetration of a known felony, such as rape or sodomy, is murder.

(c.) That if the jury should believe from the law and the

evidence that the accused is guilty of felonious homicide, but that at the time of the commission of the offense he was suffering from such mental disease or such delusion that it overpowered his will and rendered him unable to distinguish between right and wrong as to the act actually committed, or made it impossible for him to elect between right or wrong, and that no reason or rational cause or motive for the perpetration of the deed is shown to have existed, and that, furthermore, the evidence adduced on the trial shows no ill-will, or malevolence, or evil intent on the part of the accused as against the deceased, the prisoner cannot be found guilty of murder.

The judge assigns as reason for refusing to so charge the jury that there was no proof offered with respect to the mental condition of the accused at the time of or previous to the perpetration of the crime charged. No evidence to that effect is found incorporated in the transcript. None is adverted in the defendant's bill of exceptions. How, then, was it possible for the jury to have believed "from the evidence" that the accused was suffering from mental disease or delusion sufficient to have overpowered his will and rendered him unable to distinguish between right and wrong at the time he did the fatal act? Of course they could not, as there was no such evidence adduced. On the contrary, the judge states that the coroner swore that the accused was sane before and after the homicide.

As the assumed insanity of the accused is the *gravamen* of the charge requested, and there was no such proof adduced, we need not prosecute this inquiry further; for it is an elementary precept of our criminal jurisprudence that a court cannot be required to charge the jury in matters of law upon a point which does not arise in the case, and which is not applicable to the facts in evidence: *State v. Moultrie*, 84 La. Ann. 489; *State v. Thomas*, 84 La. Ann. 1084; *State v. Riculfi*, 85 La. Ann. 770; *State v. Garic*, 85 La. Ann. 970; *State v. Hamilton*, 85 La. Ann. 1043; *State v. Milton*, 87 La. Ann. 77; *State v. Ford*, 87 La. Ann. 448; *State v. Labuzan*, 87 La. Ann. 489; *State v. Simmons*, 88 La. Ann. 41; *State v. Primeaux*, 89 La. Ann. 678.

(d.) That in circumstantial evidence every necessary link in the testimony, and every material and necessary fact upon which a conviction depends, must be proven beyond a reasonable doubt, and that if any of the facts or circumstances

established be inconsistent with the hypothesis of guilt, that hypothesis cannot be true.

To this request the judge inadvertently assigned no answer; but as counsel in his brief has made no mention of it, we will pass it by without discussion. We referred to it merely for the purpose of exhausting the grounds assigned in defendant's bill of exceptions.

3. The grounds of the application for a new trial are: 1. That the verdict of the jury is contrary to law and evidence; 2. The jury disregarded the evidence submitted to them, and rested their verdict, apparently, on the evidence given on a former trial; 3. That the jury were swayed by the specious theories of the coroner, who was, against defendant's protest, allowed to testify upon matters extraneous to, and not connected with, the charge in the indictment.

It is against elementary principles, and in the teeth of a special statute, to claim that we can consider, for the purposes of the allowance *vel non* of a new trial, the evidence adduced before the jury on the issue of guilt or innocence of the accused. That question has passed beyond the domain of discussion in this court: *State v. Seiley*, 41 La. Ann. 143, and cases cited therein.

It has often been held by us that as this court has appellate jurisdiction on questions of law alone, it will not revise the refusal of the lower court to grant a motion for a new trial, based solely on an alleged deficiency of evidence to make out the case: *State v. Hopkins*, 33 La. Ann. 34; *State v. Crowley*, 33 La. Ann. 782; *State v. Young*, 34 La. Ann. 346; *State v. Diskin*, 35 La. Ann. 46; *State v. Reilly*, 37 La. Ann. 5; *State v. Taylor*, 37 La. Ann. 40; *State v. Hahn*, 38 La. Ann. 169; *State v. Smith*, 38 La. Ann. 301; *State v. Backarow*, 38 La. Ann. 316; *State v. Bates*, 38 La. Ann. 491; *State v. Bird*, 38 La. Ann. 497; *State v. Broussard*, 39 La. Ann. 671.

The discretion of the district judge cannot be disturbed on the showing made.

This completes the review of the numerous points made in this case, and our conclusion is, that the trial was regular in every particular, and no error is apparent from an inspection of the record.

The counsel who was appointed to represent the defendant has represented him with signal ability, and we are very much indebted to him for his exceptionally able and exhaustive

brief. But on the record as presented to us, there is nothing which entitles the accused to relief at our hands.

Judgment affirmed.

MURDER — MANSLAUGHTER. — As to what reduces murder to manslaughter, see *Campbell v. Commonwealth*, 88 Ky. 402, *ante*, p. 348, and note.

MURDER — MALICE. — There can be no murder in any degree without malice. Voluntary manslaughter is the most culpable phase of homicide possible without malice: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96. The use of a deadly weapon in cases of homicide raises the presumption of malice: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; compare *Oroom v. State*, 85 Ga. 718, *ante*, p. 179, and note. Murder in the first degree may be proved by the mere fact of the killing, and the attendant circumstances, and where no circumstances rebut the presumption, the law presumes that the unlawful act was both malicious and intentional: *State v. Alexander*, 30 S. C. 74; 14 Am. St. Rep. 879; *State v. Brown*, 41 Minn. 319.

MURDER — INTENT — PROOF OF OTHER CRIME. — The jury should disregard evidence introduced to prove a previous conviction of felony, which is also charged in the indictment: *People v. Von*, 78 Cal. 1. Evidence of a similar offense committed by defendant at another time and place is never admissible against him, except to show intent: *Strong v. State*, 86 Ind. 208; 44 Am. Rep. 292, and note 299-308; *Commonwealth v. Campbell*, 7 Allen, 541; 83 Am. Dec. 705; note to *Thayer v. Thayer*, 100 Am. Dec. 113. Where one is on trial for murder, evidence of an assault upon the wife of the deceased just after the killing is admissible, as tending to show the motive which actuated defendant in killing the husband: *Benson v. State*, 119 Ind. 488; but see *Shaffner v. Commonwealth*, 72 Pa. St. 60; 13 Am. Rep. 649; *State v. Lapage*, 57 N. H. 245; 24 Am. Rep. 69.

Intent is a question of fact, not of law. It may be inferred from acts of violence or the use of a weapon which is calculated to cause death: *Lane v. State*, 85 Ala. 11; but see *Patterson v. State*, 85 Ga. 131, *ante*, p. 152, and note. The intent must precede the killing: *Green v. State*, 51 Ark. 189. An unmistakable intent to kill is not necessary to prove murder: *State v. Hoover*, 4 Dev. & B. 365; 34 Am. Dec. 383; or an assault with intent to kill: *Lane v. State*, 85 Ala. 11. To establish murder, it is sufficient that defendant had mental capacity enough to form a specific intent to commit the homicide, apprehended the nature of the act, and committed the killing willfully, deliberately, and premeditatedly: *State v. Swift*, 57 Conn. 497.

SWEENEY v. SHAKSPEARE.

[42 LOUISIANA ANNUAL, 614.]

MUNICIPAL CORPORATION — RIGHT TO CONTROL RIVER BANK. — A city has the right to control, manage, and administer the use of the river banks within the corporate limits for the public convenience and utility; to establish wharves and landings; to erect and provide facilities for the use of vessels and water-craft; and to charge just compensation for the use thereof. Riparian owners or their lessees have no right to appropriate these banks to their exclusive use for such or any other purposes, and they have no private property in the use thereof which is in the public.

MUNICIPAL CORPORATIONS — RIGHT TO CONTROL USE OF RIVER BANK. — The discretion exercised by a municipal corporation in determining what are proper and needful facilities for commerce, and on what part of the river bank, within its limits, they should be established, is not a proper subject for judicial control or interference. Whatever incidental damage may result to riparian proprietors or their lessees from the exercise of such discretion is *damnum absque injuria*.

MUNICIPAL CORPORATIONS — RIGHT TO CONTROL USE OF RIVER BANK. — A riparian owner along the banks of a river within the corporate limits of a city, or his lessee, has no right to erect on the batture outside the levee in front of his property, upon piles driven in the earth, sheds or other structures for his own exclusive use and benefit; and in case of such erection the city may order the same removed, and upon refusal by the owner, may remove them.

T. M. Gill, for the appellant.

Francis B. Lee, assistant city attorney, for the appellees.

WATKINS, J. As a dealer in coal, the plaintiff has constantly on hand a number of barges laden with coal, and for their safety and security he avers it to be necessary that there should be some place on the banks of the Mississippi River, and within the parish of Orleans, where same may be landed and secured, and where suitable quarters may be provided in which to store the necessary apparatus with which to protect and secure said barges and other boats, and also for the purpose of housing the men employed, and who are required to be in immediate and constant attendance.

In his petition he avers that he has leased certain batture and riparian property about five or six miles above Canal Street landing "where he has, at large expense, sunk piles and clusters of piles, or hitching-posts, to which he makes fast said barges and boats of coal, and has built two small wooden houses at an expense of about five hundred dollars, in which to house the men, . . . and to store the apparatus absolutely necessary to his business," etc.; that the mayor and commissioner of public works "threaten to interfere with him

in the peaceful possession and use of said house, and to remove, or cause the same to be removed, on the ground that he is a squatter and obstructing Calhoun Street."

This he denies, and affirms that he is the lessee, or tenant, of the aforesaid batture and riparian rights, from the Texas and Pacific Railroad Company, the owner thereof.

He avers "that his said houses are not only necessary, as aforesaid, to the commerce in which he is engaged, but are neither on, nor do they obstruct, any street, and are built on the outside of the levee, upon piles driven in the batture aforesaid, and which batture is some three hundred feet in width from the levee to the water's edge."

Against the threatened interference alleged, plaintiff obtained an injunction, in order to preserve the *status quo*.

The city attorney ruled plaintiff to show cause why his injunction should not be dissolved on the ground that his petition stated no cause of action; and pending the trial of the rule, he specially excepted to his petition, on the same ground, and prayed that the suit be dismissed.

On trial, the rule was made absolute, the exception sustained, and suit dismissed. From the judgment plaintiff has appealed.

The city attorney's contention is, that conceding the plaintiff to be the lessee of the railroad company, and that the company was the proprietor of the soil over which the plaintiff's right of use extends, and yet he discloses no legal right in himself or in his lessor to permit the construction of such houses or other permanent structures on the batture, as those described in his petition.

On the other hand, the plaintiff's counsel seeks to restrict the issues to the limits prescribed in his petition, i. e., as to whether or not he was a squatter, and his houses an obstruction to Calhoun Street.

We do not think the issues can be so restricted; for conceding that plaintiff was not a squatter, but a lessee, and that the houses he had erected were no obstruction to Calhoun street, and yet the mayor of the city and the commissioner of public works have a perfect legal right to question his authority to build houses "outside of the levee, upon piles driven in the batture," as plaintiff avers he did.

The district judge evidently entertained this view, and rested his decision on our opinion in *Watson v. Turnbull*, 34 La. Ann. 857, which appears to be conclusive of the whole case. In that

case we said: "Within the corporate limits, the city of New Orleans, under her charter and under the general law, has the right to control, manage, and administer the use of the river banks for the public convenience and utility; to establish wharves and landings; to erect and provide facilities for the use of vessels and water-crafts; and to charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is in the public. The discretion of the city authorities, in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a proper subject for judicial control or interference. Whatever incidental damage may result to proprietors from the exercise of their unquestionable corporate rights, it is *damnum absque injuria*."

The bank of river has been defined to be "that space which the water covers when the river is highest in any season of the year": *Morgan v. Livingston*, 6 La. 216.

The term "batture" "is applied principally to certain portions of the bed of the Mississippi River which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells": *Hollingsworth v. Chaffe*, 33 La. Ann. 548.

It therefore follows that plaintiff's vendor, as a riparian proprietor, has no right to appropriate to its exclusive use any portion of the batture, and it has no right of property in the use thereof; that the city authorities are vested with a discretion in determining what are proper and needed facilities for commerce, and on what part of the batture they shall be established.

Hence the plaintiff, as lessee, acquired under his contract no such right, and under the law he could not select the place at which he should establish the landing-place for his coal boats and barges.

In *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412, we held that the defendant had no right to locate their dock and drive piles in the bed of the river near the shore, although owner of the riparian property.

In *Railroad Co. v. Winthrop*, 5 La. Ann. 86, it was held that a conversion of a portion of the batture in front of Carrollton into a wood-yard was not a public use, but a private destination of property.

In *Hudson v. Mayor*, 3 La. 564, the court decided that "any works or constructions made by individuals calculated to prevent their use entirely, or to abridge it, may fairly be considered as public nuisances, and subject to be abated by the authorities of the city."

In *Mayor v. Magnon*, 4 Mart. (La.) 9, the court held that "as the fisherman could not justify the inclosure of a space of ground on the bank of a river for the safety of his net when spread to be dried, nor the erection of a warehouse for the storage of fish, the carpenter cannot justify the erection of a permanent shed or building for the safety of his tools or the materials which he uses, nor to fence the ground for the protection of the timber which it may be his interest to accumulate."

From these frequent adjudications on the subject, we think it is well settled that the plaintiff was without right or authority to build houses on the batture, and rest their foundations upon piles driven in the ground. This was an evident appropriation, to his exclusive use, of the river bank within the limits of the city, in direct violation of the right of control and administration vested in the city.

The judgment appealed from is correct, and it is therefore affirmed.

Rehearing refused.

MUNICIPAL CORPORATIONS — WATERS. — A city may establish a public wharf, where any duly dedicated street abuts upon a navigable stream, without regard to whether the riparian owner has title to the land under the water: *Backus v. Detroit*, 49 Mich. 110; 43 Am. Rep. 447. And a city may forbid a person owning a lot abutting upon a river, upon which no wharf or public landing has been established, to use such lot as a wharf or landing, without permission of the city and the payment of wharfage: *Dubuque v. Stout*, 32 Iowa, 80; 7 Am. Rep. 171. A city, having power by its charter to do all things necessary to be done by corporations may appropriate a part of the bank of a public river within its limits for public use: *Memphis v. Wright*, 6 Yerg. 497; 27 Am. Dec. 489.

CARTER v. STATE.

[42 LOUISIANA ANNUAL, 927.]

JUDGMENTS — SEIZURE OF STATE PROPERTY TO SATISFY JUDGMENT AGAINST STATE. — Consent to execute the judgment rendered, by seizure and sale of the property of the state, is not implied by and does not follow from consent given by statute to maintain suit against the state. If such consent were expressly given by the statute, it would be unconstitutional and void. Such a judgment is without compulsive force, and the only recourse for its satisfaction is by application to the legislature.

STATUTE AUTHORIZING SUIT AGAINST STATE has no effect beyond referring to the judiciary, for settlement, the questions of law and fact involved in the claims, and the determination, in the form of a judgment, of the rights of the parties. It does not authorize a seizure of state property to satisfy such judgment, and only conveys an implication that the legislature will recognize such judgment as final, and make provision for the satisfaction thereof.

LEGISLATIVE CONTROL OF STATE FUNDS. — The control, disposition, and appropriation of state funds to the payment of debts against the state are powers exclusively belonging to the legislature, and cannot be delegated to or exercised by the courts, under the Louisiana constitution.

Land and Land, and A. H. Leonard, for the appellant.

J. Henry Shepherd, district attorney, for the appellee.

FENNER, J. By an act of the general assembly, No. 81 of 1884, plaintiff was authorized to sue the state of Louisiana for a certain indebtedness alleged to be due under a contract with the state. In accordance therewith, he brought his suit and recovered a judgment against the state in March, 1885, which became final without appeal. He alleges that at the session of the general assembly in 1886, and at the subsequent session in 1888, he applied for an appropriation to satisfy his said judgment, by bills for that purpose introduced by members, which said bills were defeated, and that his only remedy for the enforcement of his rights under said judgment is by the exercise of the judicial power.

He avers that the state owns property, rights, and credits which form no part of its annual revenues derived from taxation for the support of the government, and which are not exempt from seizure and sale, and that he has the right to execute his judgment by seizure and sale thereof under the usual process.

He prays, therefore, that the state be cited through her governor, and that, after due proceedings, there be judgment decreeing that a writ of execution or *fieri facias* issue on said judgment against the state, commanding the seizure and sale

of any of her property not forming part of her annual revenues derived from taxation, to an amount sufficient to pay and satisfy said judgment.

The state appeared by counsel and filed an exception of no cause of action, and from a judgment sustaining said exception the plaintiff brings the present appeal.

The learned counsel of plaintiff fully and frankly concedes the principle, now fortunately too firmly established by repeated judicial decisions to admit of further controversy, that a state of this Union cannot, directly or indirectly, be sued by its own citizens, or by the citizens of other states, or of foreign nations, either in its own courts or in the federal courts, without its consent. His contention, as we understand it, is, that the state, in this case, has consented to be sued, and that the effect of such consent is to subject the state to the judicial power and jurisdiction, not only for the purpose of entertaining, hearing, and deciding the suit, but also for the purpose of executing and enforcing the judgment by the seizure and sale of the property of the state and by applying the proceeds to the satisfaction thereof.

Our answer to this contention is twofold, viz.: 1. The consent to execute the judgment rendered by seizure and sale of the property of the state is not implied by and does not follow from the consent given to the suit; 2. If such consent had been expressly given by the legislative power, it would be unconstitutional, null, and void.

1. Legislative acts authorizing individuals to sue the state upon claims which the legislature, for any cause, does not see fit to recognize and pay have been of common occurrence in this and in other states. Their purpose and effect, as commonly understood, are undoubtedly nothing more than to refer to the judiciary the settlement of the questions of law and fact involved in the claims, and the determination, in the form of a judgment, of the rights of the parties. It is implied, as a matter of course, that the legislative power, after making such a reference, will accept and abide by the judicial determination, will recognize the judgment rendered as final and conclusive, and will, in due and ordinary course, make provision for the satisfaction thereof.

That such was the interpretation of his remedy adopted by the plaintiff himself is evinced by his applications to successive general assemblies for an appropriation to satisfy his judgment.

But to assume that by consenting to be sued the legislature intended to abdicate its constitutional function of controlling and administering the public funds and property, and of appropriating them to such lawful purposes as it may deem best, and to delegate to the judicial department the power of seizing such property and applying it to the payment of a particular debt, would be, beyond measure, rash and unjustifiable. No such intention is expressed in the act, or can be fairly implied from its terms; and we consider it beyond question that no such intention ever entered into the mind of any member of the legislative body. The incidents and appurtenances of ordinary jurisdiction have no application to a case like this. Undoubtedly, jurisdiction granted to render judgments between parties subject to judicial power and control implies power to execute such judgments. But the sovereign is not subject to judicial power and control, except just so far as it has consented thereto; the moment the limit of that consent is reached, the judiciary must instantly halt. Satisfied, as we are, that the legislature has not consented and did not intend to consent to the execution of this judgment by writ of *feri facias*, we are bound to deny such remedy.

Counsel asks, Of what use is the power to render judgment against the state, if the court is powerless to execute the judgment? That question was anticipated by Mr. Hamilton, in the discussion of the constitution of the United States before its final adoption. "To what purpose," he asked, "would it be to authorize suits against sovereign states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state": Federalist, No. 81. He never dreamed that authorizing suit against a state would imply the right to issue *feri facias* on the judgment.

Puffendorf says: "And if the prince gives the subject leave to enter an action against him in his own courts, the action itself proceeds rather upon natural equity than on municipal laws. For the end of the action is, not to compel the prince to observe the contract, but to persuade him."

In England, claims against the crown might be prosecuted before certain courts in the form of petitions of right, with the consent of the king; but it was held by Lord Mansfield that "if there were a recovery against the crown, application must be made to Parliament, and it would come under the head of supplies for the year": *Macbeth v. Haldimand*, 1 Term Rep. 172.

We have examined all the authorities quoted by counsel, and find none of them to support his contention. We are quite certain that no precedent exists sustaining the issuance of a *fiery facias* on a judgment against a sovereign state in her own courts, though rendered with her own consent.

The only recourse for satisfaction is by application to the legislature, with whom the judgment should surely have great persuasive force, but none compulsive.

2. We are quite satisfied that if the legislature had expressly authorized the court to execute this judgment by the issuance of the writ of *fiery facias*, and the seizure and the sale of the property of the state for its satisfaction, such action would have been unconstitutional, null, and void.

Articles 14 and 15 of the constitution divide the powers of government into three distinct departments, and provide that "no one of these departments, nor any person or collection of persons holding office in any one of them, shall exercise power properly belonging to either of the others."

The fiscal affairs of the state, the possession, control, administration, and disposition of the property, funds, and revenues of the state are matters appertaining exclusively to the legislative department. Except in so far as the constitution itself has appropriated them to particular purposes, the legislative department has exclusive control of them. No debt of the state can be paid without an appropriation, and the constitution provides the manner in which alone appropriations shall be made. The judicial department is vested with no right or authority over such matters, directly or indirectly. If the legislature, in authorizing the judiciary to entertain suits and render judgments against the state, should add the authority to execute the same by seizure and sale of the state's property and the application thereof to the payment of the debt recognized by the judgment, it would be delegating to the judicial department powers exclusively vested in the legislative department, in violation of the express prohibition of the constitution. The giving to the exercise of such powers the form of judicial process would not destroy its essential character. It would still be, in effect, the exercise of the purely legislative power of disposing of and appropriating the property and funds of the state to the payment of a particular debt of the state. Such powers the judiciary and all members thereof are prohibited from exercising, with or without the legislative consent.

If the legislature could delegate such power in one instance, it might refer all public creditors to the courts for satisfaction, and shoulder on the judiciary the whole burden of distributing the state's property and funds amongst them in a *concursus*.

We will not further elaborate the subject.

Judgment affirmed.

SOVEREIGNTY — SUITS AGAINST A STATE. — A state cannot be sued and proceeded against as in the case of private persons, except by its own consent: *McWhorter v. Pensacola etc. R. R. Co.*, 24 Fla. 417; 12 Am. St. Rep. 220, and note; *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121.

CONFLICT BETWEEN LEGISLATIVE AND JUDICIAL POWERS. — The judiciary can exercise no power which properly belongs to the legislature: *Hawkins v. Governor*, 1 Ark. 570; 83 Am. Dec. 346.

SCHMITT v. DROUET.

[42 LOUISIANA ANNUAL, 1864.]

OFFICIAL BONDS — NOTARY — LIABILITY OF SURETY. — The law which specifies the conditions and obligations of an official bond furnished by a notary public in compliance therewith forms part of the bond, and must be strictly construed against the surety therein.

OFFICIAL BONDS — NOTARY — LIABILITY OF SURETY. — The surety on the official bond of a notary public is liable only to such persons as have employed him, and who have suffered injury on account of his failure to perform a duty incumbent on him or required and authorized by law.

OFFICIAL BONDS — NOTARY — LIABILITY OF SURETY. — Where a notary public does a thing which the law does not authorize him to do, although he does so *eo nomine*, in his capacity of a notary, the surety on his bond is not liable.

OFFICIAL BONDS — NOTARY — LIABILITY OF SURETY. — A notary public is not authorized by law, nor is it a duty incumbent upon him, to write officially on any note, or utter any certificate, that a prolongation of payment of a debt has been allowed by an act before him; hence the surety on his official bond is not liable for such act, even if such certificate is shown to be false.

Charles Lougue, for the appellant.

W. E. Murphy and Omer Villeré, for the appellees.

BERMUDEZ, C. J. This suit involves the liability of a surety on a notary's bond furnished in 1884.

From a judgment in favor of Trepagnier and Birba, the surety, Rabasse, appeals.

The facts are as follows: —

On the 28th of May, 1883, and on the 18th of December of the same year, two mortgage acts were drawn up by Oscar

Drouet, a notary for the parish of Orleans, by the first of which Degeorge is said to have issued two notes of five hundred dollars each, in favor of Trepagnier, and by the second of which Mansion is stated to have issued, in favor of Tudury, three notes of one thousand dollars each, and both to have secured them by mortgage on their respective property described in the acts.

At the dates of the acts, the notary paraphrased the notes "*ne varietur*," as secured by mortgage by acts before him.

On the notes are found unsigned indorsements showing payments of interest at different times.

Each of the five-hundred-dollar notes bears an indorsement in the following terms: "*Ne varietur*."

"In conformity with an act passed this day before me, containing prolongation of payment of this note for one year from 28th of May last, and all interest paid up to 28th May, 1889.

"OSCAR DROUET, Notary Public.

"NEW ORLEANS, 11th May, 1888."

Each of the one-thousand-dollar notes bear a similar indorsement, except as to the date from which the prolongation begins, and up to which the interest was paid, which is the 18th of December, 1889. The indorsement is dated "New Orleans, 27th Dec., 1888," and is signed "Oscar Drouet, Notary Public."

Neither the acts of mortgage nor the notes were signed by either Degeorge or Mansion. That which purported to be their signatures thereto had been forged by Drouet, the notary. The acts of prolongation referred to in the indorsements had no existence. They had never been even drawn up and forged.

Trepagnier and Birba owned the notes previous to the dates of the last indorsements thereon referring to the acts of prolongation.

On the 22d of August, 1884, long before the date of the last indorsements, Drouet had furnished a bond, as notary for the parish of Orleans, for the sum of five thousand dollars, with Eugene Rabasse as surety thereon, containing the following stipulation: "The condition of the above obligation is such that of the above-bounden Oscar Drouet shall well and faithfully discharge and perform all the duties incumbent on him as notary public in and for the parish of Orleans, then and in such case the above obligation to be null and void, otherwise to remain in full force and virtue."

The question presented is, simply, whether Rabasse is liable to Trepagnier and Birba because of the falsity of the indorsements made by Drouet, as notary, on the 11th of May and 27th of December, 1888, on the notes respectively then held by them, after the date of the bond furnished by him.

In order to solve the question, it becomes necessary to determine the extent of the responsibility assumed by the surety, and ascertain whether the act done by Drouet was a duty incumbent upon him as notary, coming within the purview of the contractual obligation entered into.

The bond is a legal bond, furnished in compliance with a special law requiring it, and which forms part of it.

The stipulations which it thus contains constitute the contract entered into, and must be strictly construed.

The object contemplated was to make certain that the notary would discharge and perform well and faithfully all the duties incumbent upon him; and in case of his failure to do so, and loss was sustained thereby, to hold the surety liable.

Section 2503 of the Revised Statutes indeed provides that the bond shall be "conditioned for the faithful performance of all duties required by law toward all persons who may employ him in his profession of notary."

The section applies to all bonds furnished by notaries, whether for the parish of Orleans or the other parishes.

Under the law, notaries and their sureties are liable to all persons who have employed them, and who suffer injury on account of their failure to perform a duty incumbent on them or required by law.

It would be cumbersome, and unnecessarily so, to enumerate all the acts which a notary may legally do.

A notary is defined to be an officer whose duty is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained: 2 Abbott's Law Dict. 182, V, Notary.

Also, a notary is a public functionary authorized to receive all acts and contracts to which parties wish to give the character of authenticity attached to the act of public authority, to secure their date, their preservation, and the delivery of copies: 5 Dict. Droit Civil, 27, V, Notaire.

Although section 2492 of the Revised Statutes provides that notaries public shall have certain powers, it does not undertake to enumerate them all. It does not mention, for instance, that of receiving the renunciation of married women of their

rights over the property of their husbands; the duty imposed upon notaries to attend to the registry of acts of sale in the conveyance-book of the proper office, to paraph notes secured by privilege, or mortgage with acts before them (R. C. C., sec. 8384), and various other acts authorized by law.

In the cases of solemn acts, that is, of acts which, in order to be valid, must be drawn up after the fulfillment of certain specified formalities, and must be framed in a particular form, a failure by the notary to observe the ceremonies required by law, which it is incumbent upon him to comply with under pain of nullity, the notary is responsible for a non-compliance therewith, and his bondsmen are likewise liable with him, their obligation being that he will faithfully discharge and perform all the duties incumbent on him, or required by law of him, or else he and they will be liable toward persons employing them.

Before a notary and his surety can be held, it is necessary, therefore, to determine whether the act done or not done, committed or omitted, was or not authorized by law, was or not incumbent upon him, was or not required of him, whether he was directed to do it, whether he has failed to discharge the duty, and whether injury has been sustained.

It has hence been held that where a notary does a thing which the law does not authorize him to do, although he does so *eo nomine*, in his capacity of a notary public, the surety is not responsible.

In *Brown v. Schmidt*, 7 La. Ann. 349, it was decided that where a purchaser had paid the price to the notary, he incurred the risk of the deposit.

In *Lesconzeve v. Ducatel*, 18 La. Ann. 470, which was a suit against a notary and his sureties for the recovery of money deposited with the notary and not delivered by him, the court stated that the law had not made it the official duty of a notary to receive money, holding that "the securities of a notary are only liable on his failure to discharge the duties of his office."

In *Monrose v. Brocard*, 20 La. Ann. 78, which was a kindred suit, the court relieved the surety, saying that the security which the notary gives for the faithful performance of his duties is only bound for such acts of his as the law authorizes or requires him to do in his official capacity.

In *Saloy v. Hibernia Nat. Bank*, 39 La. Ann. 93, these rulings were referred to with approval.

Indeed, by signing the bond the surety tells all who may need the services of a notary: You can go with security to this notary. I assure you that he is a competent officer; that he will well and faithfully discharge and perform all the duties imposed upon him by law; and if he fails in doing so, I will be responsible to you for loss sustained.

If, therefore, a person calls on a notary for the performance of a duty incumbent upon him, and the notary fails therein, and injury is suffered, the surety is liable to the party injured.

Burge on Suretyship, page 49, says that the surety of a public officer is responsible only for those acts which are done by virtue, or under color, or by means of the office he holds.

Laurent, volume 19, page 108, No. 112, while dealing with the responsibility of notaries, says: "*Hors de la mission, l'officier public n'est plus qu'un simple particulier.*"

Applying these principles to the case under consideration, it is apparent that there exists no law authorizing a notary, or making it a duty incumbent upon him, to write officially on any note, or utter any certificate, that a prolongation of payment of a debt has been allowed by an act before him.

Such attestation could not be authentic; would be in law barren of any effect; could subserve no useful purpose. It could not prove itself; could not be admitted as evidence to show the fact of extension or prolongation. To establish this, the act referred to would itself, or a copy, have to be produced as the best proof. It would be nothing but a written hearsay declaration, and, as such, inadmissible and of no effect.

Although it is manifest that the notary in this case has committed wrongful and criminal acts, for which he could have been prosecuted and punished had he lived, it does not follow that his surety can be held pecuniarily responsible.

It may be that had the plaintiffs employed the notary to draw up the acts of prolongation, and have them signed by the proper parties, and had he prepared them, forging the signatures of the appearers thereto, thereby lulling the creditors into security, and preventing them from taking steps to enforce recovery in some way, the surety might be endangered; but the reason would have been that the notary employed to draw up the acts had failed to perform a duty incumbent upon him, and required of him by his employer, and had prevented the creditor from having recourse to law to secure his rights; but this is not the case presented, which is simply one in which a surety is sought to be held because his principal,

the notary, has done acts which the law did not authorize or compel him to perform, and which were therefore not incumbent upon him.

The suggestion of want of jurisdiction, made since the submission of the case, has no merit.

This suit is for a sum exceeding two thousand dollars. The judgment was for upward of two thousand five hundred dollars. The appellant admits no liability, and seeks the reversal of the judgment.

For these reasons it is ordered and decreed that the judgment appealed from be avoided and reversed, and it is now adjudged that there be judgment in favor of the defendant Rabasse, respecting the demand of the plaintiffs, Trepagnier and Birba, against him as surety, with costs in both courts.

NOTARY PUBLIC — OFFICIAL BOND. — The sureties upon the official bond of a notary public are liable for any damages occasioned by his negligence or misconduct in the line of his official duty: *Mason v. Crabtree*, 71 Ala. 479; *Bocheroux v. Jones*, 29 La. Ann. 82; but otherwise where the notary acts outside his official duty: *Saloy v. Hibernia Nat. Bank*, 39 La. Ann. 90.

STATE v. BONEIL.

(22 LOUISIANA ANNUAL, 1110.)

VIOLATIONS OF MUNICIPAL ORDINANCES are not usually or properly regarded as crimes, in the sense in which that word is commonly used, which embraces only offenses against the public criminal statutes of the state. The laws regulating forms of proceeding, and the constitutional provisions relating to the latter, do not apply to the former.

MUNICIPAL CORPORATION — ENFORCEMENT OF ORDINANCE — Where a city has authority to enforce her legal ordinance by the imposition of fine, and by imprisonment in default of payment, the city recorder must enforce such ordinance, and cannot himself violate the same by imposing a greater or less penalty.

LOTTERY, WHAT IS. — Any scheme for the distribution of prizes by lot or chance, or by which one, on paying money or other valuable thing to another, receives a ticket which entitles him to receive in return a larger value or nothing, as some formula of chance may determine, is a violation of a city ordinance prohibiting lotteries.

LOTTERY, WHAT IS. — A scheme by which a person who pays five cents for a package of tea is entitled to select it from a number of envelopes, some of which, in addition to tea, contain a ticket which entitles the purchaser to a prize, while the others contain nothing but the tea, is a lottery; and the sale of such packages of tea is a violation of a city ordinance prohibiting lotteries.

Lionel Adams, for the appellant.

T. McC. Hyman, assistant city attorney, and Carleton Hunt, city attorney, for the appellee.

FENNER, J. Defendant was prosecuted under city ordinance No. 92, C. S., which reads as follows: "1. That it shall be unlawful for any person or persons to sell, barter, exchange, or otherwise dispose of any lottery ticket, or token, policy, combination, device, or certificate, or fractional part thereof, in any lottery drawn or to be drawn in or out of the city of New Orleans, unless the same be duly authorized by the laws of the state of Louisiana; that any person or persons violating the provisions of this ordinance shall, upon conviction before the recorder within whose jurisdiction the offense was committed, be condemned by said recorder to pay a fine of twenty-five dollars for each offense, and in default of payment, to imprisonment for not less than twenty nor more than thirty days."

The charge, as set forth in the affidavit, is, that on a given day in a given month, in the year 1890, "at about eight o'clock, P. M., at the corner of Claiborne and Mandeville streets, within the jurisdiction of this court, one A. Boniel did then and there willfully and unlawfully violate C. O. 92, C. S., in this, to wit, by selling illegal prize packages of tea."

The evidence is, substantially: The business of the defendant is conducted in the following manner: Upon a counter, behind which he stands with his clerks, are placed a large number of sealed envelopes, containing what he terms "Enterprise Tea," of the value of five cents. In addition to the tea, some of these envelopes contain a ticket naming and entitling the holder to some article or other, such, for example, as a silk handkerchief, a little lard, a turkey, a chicken, etc., and called "prizes" by the witnesses. Other envelopes contain nothing but the "Enterprise Tea," and these are termed "blanks" by the witnesses. The purchaser, upon the payment of five cents, is at liberty to select an envelope from any of the lots exposed upon the counter; and if the envelope contains, besides the tea, a ticket, the holder of the ticket is entitled to the article mentioned upon it, and the article, which is the prize, is handed the purchaser and holder by defendant.

Against further proceedings before the recorder in the prosecution of defendant, because of the matters against him in the said affidavits presented and charged, these objections were urged: 1. That no offense is set out in the affidavit; 2. That

the ordinance is unconstitutional, in that it undertakes, by arbitrarily fixing the penalty, to deprive the recorder of the discretionary power vested in him by a statute of the state; 3. That the facts proven amount to no offense, as the ordinance is only leveled at the conduct of lotteries to be drawn in the city of New Orleans or elsewhere; 4. That there is no law upon the statute-books (April, 1890) authorizing the city of New Orleans to impose imprisonment for the violation of an ordinance in default of the payment of the fine imposed.

He was sentenced on each affidavit to pay a fine of twenty-five dollars, and in default of payment, to imprisonment for twenty days, from which he prosecutes the present appeal.

We shall consider his objections *seriatim*.

1. He was charged with violating ordinance 92, "by selling illegal prize packages of tea." The time, place, and date of the act complained of are specified, and we think the charge sufficiently advised defendant of the offense and the nature thereof. Violations of municipal ordinances are not usually or properly regarded as crimes, in the sense in which that word is commonly used, which embraces only offenses against the public criminal statutes of the state; and the laws regulating forms of proceeding, and the constitutional provisions relating to the latter, do not generally apply to the former: *State v. Heuchert*, 42 La. Ann. 270; *Mayor etc. v. Meuer*, 35 La. Ann. 1192; 1 Dillon on Municipal Corporations, secs. 432 et seq.

2. The next objection is, that the ordinance violates section 12 of the act No. 131 of 1877, which declares: "That the said recorders [of New Orleans] shall have power and authority to enforce all ordinances of the city of New Orleans, and shall have power, for violation of the same, to impose fines, not to exceed twenty-five dollars for each offense, and in default of payment, to sentence the party fined to imprisonment for not more than thirty days."

The complaint is, that this statute was intended to vest recorders with discretion as to the penalty, within the limits fixed, regardless of the penalty fixed by the ordinance, and that the ordinance, in fixing a penalty even within those limits, deprives the recorder of his discretion, and is thus illegal. We think it very clear that the statute quoted conferred upon recorders, primarily, the power to enforce all city ordinances, and only secondarily limited the penalties which they should have power to impose. If the ordinance did not prescribe the measure of the penalty, then perhaps the recorder

might, in his discretion, fix the penalty, within the limits prescribed; but if the ordinance itself fixes the penalty, not exceeding the limits referred to, then the recorder must enforce the ordinance, and cannot himself violate the same by imposing a greater or a less penalty.

The city of New Orleans has always had authority to enforce her legal ordinances by the imposition of fines, and by imprisonment in default of payment. Such power was expressly granted in the charter of 1870: Ex. Sess. 1870, act 7, sec. 12. That section authorized fines not exceeding one hundred dollars, and in case of non-payment, imprisonment not exceeding thirty days. The enforcement of such ordinances could only be claimed before the recorders of the city. When in act No. 181 of 1877 the legislature limited the power of recorders to imposing fines not exceeding twenty-five dollars, the practical effect was to limit to the same extent the power of the city, because she could not collect a fine exceeding twenty-five dollars.

Therefore prior to the passage of the city charter the law was, that the city had the right, through her recorders, to enforce her ordinances by fines not exceeding twenty-five dollars, and in case of non-payment, by imprisonment not exceeding thirty days. Nothing in the city charter of 1882 is in conflict or inconsistent with these prior statutes, and the law then existing was not repealed or affected thereby: *State v. Natal*, 39 La. Ann. 489.

The sufficiency of these prior statutes was no doubt the reason why it was deemed unnecessary to embody their provisions in the new charter of 1882.

The act No. 41 of 1890 has not, in our opinion, changed the prior law on this subject, except in so far as it authorizes both fine and imprisonment. It was passed after the decision of the court below in this case, and was, no doubt, framed to silence, for the future, such objections as those here urged.

We are clearly of the opinion that the city had authority to fix the penalty in her ordinance, and that the recorder only performed his duty in sentencing defendant accordingly: *State ex rel. Joseph v. Bringier*, 42 La. Ann. 1095.

3. The business of defendant, as exhibited by the evidence, was undoubtedly a violation of the ordinance.

A lottery is "a distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other

articles": Worcester's Dictionary; "A scheme for the distribution of prizes by lot or chance": Webster's Dictionary; "Any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine": Bishop on Statutory Crimes, sec. 952.

These definitions completely cover the offense proved against defendant. Frequent judicial interpretation confirms this view. A case arose in Illinois identical with the instant one. The defendant was conducting what he termed a "gift-sale" establishment. He kept upon his desk a box filled with envelopes, purporting to contain valuable recipes and popular songs, and also a card descriptive of some one of various articles of different values. The price of the envelopes was twenty-five cents, and the purchaser had the right to buy for one dollar the article described on his ticket, which might be worth hundreds of dollars or very little. This scheme was held to be a lottery, and the sale of the envelopes to be the sale of a "lottery ticket," within the terms of the statute: *Dunn v. People*, 40 Ill. 465.

In another case, the defendant sold, at five cents each, packages of "prize candy," some of which contained coupons entitling the purchaser to a small sum of money on presentation at the counter. Held, to be the "setting up of a lottery" prohibited by the statute: *State ex rel. Reaslee v. Sheriff*, 10 Phila. 203.

In another, defendant sold "prize candy" in boxes, for fifty cents, each box represented to contain a prize of money or jewelry of large or small value, the purchaser selecting his box in ignorance of its contents. Held, to be a "lottery device" forbidden by the statute: *Holoman v. State*, 2 Tex. App. 610; 28 Am. Rep. 439. See also *Charannah v. State*, 49 Ala. 396; *Commonwealth v. Wright*, 137 Mass. 250; 50 Am. Rep. 306; *Negley v. Devlin*, 12 Abb. Pr. 210; *Hull v. Ruggles*, 65 Barb. 432; *State v. Clarke*, 33 N. H. 329; 66 Am. Dec. 723; *State v. Bryant*, 74 N. C. 207.

4. The last objection of defendant is disposed of by what we said under the second. Power given to the city to enforce her ordinances by fines, if unattended with power to imprison in default of payment, would be in most cases nugatory, since the impecunious criminal would regard such a penalty as a delicious joke, and snap his fingers in the face of impotent justice. While this would not justify us in recognizing the exist-

ence of a power not granted, however necessary, it lends force to our construction of the statutes on the subject.

Judgment affirmed.

LOTTERY. — As to what constitutes the offense of maintaining and operating a lottery, see extended note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 42-48; *People v. Elliott*, 74 Mich. 284; 16 Am. St. Rep. 640.

MUNICIPAL CORPORATIONS — ORDINANCES, VIOLATION OF. — While all state offenses must be prosecuted in the name of the state, an incorporated municipality may by ordinance provide that the violations of its penal ordinances may be prosecuted in the name of the municipality: *Bastock v. City of Galveston*, 27 Tex. App. 342. Violations of municipal ordinances are not crimes, unless embraced in the elemental definition of crimes as recognized by the penal statutes: *Floyd v. Commissioners*, 14 Ga. 354; 58 Am. Dec. 559.

MUNICIPAL CORPORATIONS — ORDINANCES, ENFORCEMENT OF. — A city has no power to punish violations of its ordinances by fine or imprisonment, or other penalty, unless such power is expressly conferred upon it by charter: *State v. Bright*, 38 La. Ann. 1; 53 Am. Rep. 155. But see note to *Robinson v. Mayor etc.*, 34 Am. Dec. 641, as to the implied authority of a city to enforce ordinances by imposing penalties. A charter authorizing a city to punish a violation of its ordinances by fine or imprisonment, or by fine and imprisonment, or by sentence to labor, or in event of the non-payment of the fine and costs, to a sentence to work out the fine and costs, a defendant upon conviction cannot be fined and also sentenced to labor, unless the sentence to labor is added merely as a mode of enforcing the payment of the fine: *In re Balken*, 84 Ala. 21. A municipal ordinance providing punishment by a fine of not more than five hundred dollars, and imprisonment for not exceeding sixty days, or both, does not authorize a sentence to pay a fine of one hundred dollars, or work sixty days on the public streets of the city: *Ex parte Martini*, 23 Fla. 343. The charter authorizing a punishment by a fine of not more than one hundred dollars, or thirty days' imprisonment, the city passed an ordinance providing the punishment for violations of its ordinances by a fine of not more than one hundred dollars, or imprisonment at the discretion of the council. In such case it was decided that the discretion of the council was limited to a period of thirty days: *Town Council v. Oakham*, 30 S. C. 94.

STATE v. MILLER.

(42 LOUISIANA ANNUAL, 1186.)

CRIMINAL LAW — EVIDENCE — RIGHT OF ACCUSED TO QUESTION ADMISSIBILITY OF. — While the court must be satisfied of the competency and admissibility of evidence offered, the accused has the right to prevent the admission of incompetent or inadmissible evidence against him; and the fact that the trial judge is satisfied of the competency and admissibility of proffered testimony does not exclude the right of the accused to question it.

CRIMINAL LAW — EVIDENCE — RIGHT OF ACCUSED TO CROSS-EXAMINE WITNESSES. — The admissibility in evidence of a confession by the accused

must necessarily be tried and determined by the court before the same is permitted to go to the jury as evidence; but in such trial the accused has a right to participate, and to cross-examine the witnesses by whom the confession is sought to be proved.

CRIMINAL LAW — RAPE — AGE OF CONSENT. — A female under the age of twelve years is incapable of yielding consent to sexual intercourse.

Fournet and Pujo, and W. G. McDonald, for the appellant.

Walter H. Rogers, attorney-general, for the appellee.

WATKINS, J. The defendant prosecutes this appeal from a verdict and sentence to lifetime imprisonment under an indictment for rape, and he relies on three bills of exception reserved to the rulings of the trial judge during the progress of the trial, and one taken to his charge to the jury.

1. The three bills which were reserved during the progress of the trial appertain to the judge's refusal to permit defendant's counsel to cross-examine three witnesses of the state preliminary to their giving in evidence certain alleged confessions of the defendant, the object of defendant's counsel, as stated in his bills of exception, being to ascertain whether or not the alleged confessions were freely and voluntarily made, as a condition precedent to their introduction as evidence.

The judge assigns as his reasons for refusing to permit defendant's counsel to cross-examine state witnesses, that "the court, and not the jury, nor the opposite party, is to be satisfied as to the competency of witnesses to testify, or the admissibility of such evidence; that the right of the opposite party to affect the weight of the evidence on the examination is not abridged in the least; the witness having testified that she heard the entire statement of the accused, and remembered the substance of all of it, and that it was made by him voluntarily, without restraint or influence of any kind; and she stated the circumstances under which it was made."

While it is no doubt true that it is for the court to be satisfied of the competency and admissibility of evidence, and not that of the jury, it is equally the right of an accused party to see that no incompetent or inadmissible testimony be adduced against him; and the fact that the trial judge feels satisfied of the competency or admissibility of certain proffered testimony cannot exclude the right of the accused to question it.

The competency and admissibility of testimony must necessarily be tried and determined before same is permitted to go to the jury as evidence. Recognizing this rule of law, the

judge entertained the investigation of the question of the admissibility of the defendant's alleged confession, and allowed questions to be put to the state's witnesses tending to elicit the statements quoted; but when defendant's counsel demanded the right to cross-examine these witnesses in the premises, his demand was refused for the reasons assigned.

This was error of the judge.

Thus holding was virtually to decide that the determination of the admissibility of evidence is an *ex parte* proceeding, in which the accused has no concern whatever.

To say that on the trial the defendant will have the right to offer other testimony for the purpose of disparaging the evidence adduced by witnesses for the state, in reference to the confession, is no answer to the objection that is pressed here. He had an undoubted right to participate in the trial of the preliminary issue, — the admissibility of the alleged confessions *vel non*, — before the evidence was permitted to go to the jury.

That right was distinctly recognized by us in *State v. Platts*, 34 La. Ann. 1061. The question is formulated by the court thus: "The first matter presented to our consideration is the ruling of the judge *a quo*, refusing to hear evidence offered by the accused on the trial of the cause, relating to the character of the alleged confession of the accused," etc.; and of this ruling the court said: "It is elementary that the confession of an accused person is not admissible against him unless it is a free and voluntary confession, and its character as such must be first shown as a prerequisite to its admission. When the state offers to make such proof, the issue as to the character of the confession is properly raised, and both sides have a right to be heard on this issue. The inquiry on a question of such vital importance to an accused should be free and full, and it is not to be closed at the very instant that the state manages to eke out from the prosecuting witness that she, the witness, had made no threats or promises, and all opportunity denied to the other party to be heard. And the judge had no right to conclude, as he says in the bill he did do, that the testimony offered by the accused could not be sufficient to overthrow the facts shown by the [state] witness."

The trial judge in the instant case has fallen into a similar error. The accused had an undeniable right, by his counsel, to cross-interrogate the witnesses of the state in reference to the

time, place, and circumstances of the alleged confessions, and to ascertain for himself whether same were voluntarily made. He cannot be restricted to the sole right of attacking the confessions, once they are introduced in evidence, by other and countervailing proof.

This right was recognized and pursued in *State v. Collens*, 37 La. Ann. 607.

To the same effect is *State v. Peters*, 14 La. Ann. 521; 1 Greenl. Ev., sec. 219.

On this ground, we think the case should be remanded for a new trial.

2. The fourth bill of defendant was taken to the charge of the judge to the effect that "a girl under twelve years of age is incapable, under the law, of yielding consent to sexual connection."

Having decided to remand the case, this question does not necessarily arise now, but we think it preferable that it should be determined, in order that the new trial may be facilitated.

The only case to which we have been referred as bearing on the question is that of *State v. Tilman*, 30 La. Ann. 1249, 31 Am. Rep. 236, in which our predecessors held that "carnal intercourse with a female under twelve years of age amounts to the crime of rape." The court announced that no statute of this state has declared that a female under twelve years of age is incapable of giving consent to sexual intercourse; but upon the principles of the common law and analogous provisions of our own, it thought a girl under twelve years of age was incapable of yielding such consent.

That opinion appears to be well reasoned, and the authorities cited pertinent, and we are not disposed to dissent from the views therein expressed. We therefore approve of the ruling of the trial judge in this respect.

It is therefore ordered and decreed that the verdict and judgment appealed from be annulled and set aside, and that the cause be remanded to court *a qua*, to be therein proceeded with according to law and the views herein expressed.

RAPE — AGE OF CONSENT. — When the female is of such tender years as to not understand the nature of the act, she cannot consent to carnal intercourse: Note to *Smith v. State*, 30 Am. Dec. 374. The age of consent is generally fixed by statute. In Louisiana it is twelve years: *State v. Tilman*, 30 La. Ann. 1249; 31 Am. Rep. 236. In Michigan it is fourteen years: *People v. Glover*, 71 Mich. 304. In Nebraska is fifteen years: *State v. Wright*, 25 Neb. 28. In Iowa it is thirteen years: *State v. Casford*, 76 Iowa, 330.

CONFESSIONS—DUTY OF COURT.—The court is the sole judge of the competency of confessions, and before admitting a confession in evidence, it should conduct a preliminary examination, out of the presence of the jury, to determine whether such confession is or is not competent: *Miller v. State*, 65 Miss. 44; 7 Am. St. Rep. 634, and note. And the fact that the court admits a confession as competent does not prevent the accused from producing evidence before the jury with respect to the weight of such confession, for the jury alone must determine its weight: *Miller v. State*, 65 Miss. 44; 7 Am. St. Rep. 634, and note.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

WELLS v. NEW HAVEN AND NORTHAMPTON CO.

[151 MASSACHUSETTS, 46.]

NUISANCE, CONTINUING LIABILITY FOR. — The building and maintaining of a railway in such a manner as to bring together natural streams of water so as to discharge them through a culvert, at a place different from that of the natural discharge of any of them, whereby their waters are combined and thrown upon the lands of a private proprietor, creates a continuing nuisance, and if the owner of the lands at the time the railway was built subsequently conveys them, his grantees are entitled to maintain an action for damages suffered after his conveyance was executed, by the overflow of water and the depositing of sand on such land.

NUISANCE — PRESCRIPTIVE RIGHT TO MAINTAIN. — If an act is wrong at the outset, its continuance cannot become rightful, and if its continuance will occasion damages varying in quantity with the seasons, it is a continuing nuisance and an invasion of plaintiff's right from day to day, and he may select his own time for bringing an action therefor, and is not barred by the lapse of six years from the erection of the structure constituting the nuisance, though it is of a permanent character.

ACTION brought for damages caused by the discharge of water upon lands of the plaintiff. The injuries suffered by him were the result of the construction of a railway in 1880, alongside of lands which he purchased after that date. In building its road the defendant had erected an embankment to support its track, through which a culvert was built. The course of eight streams was changed by defendant, so that their waters would discharge through this culvert at a place different from that in which they naturally flowed. In 1887 there were heavy rains, which by reason of the culvert were caused to flow upon the lands of the plaintiff, and to overflow it with

water and to cover it with sand, to the injury of his crops. The defendant sought to have the trial court instruct the jury that the plaintiff could not maintain his action, because it was barred by the statute of limitations, and that because his injuries were the result of a permanent structure, no cause of action arose therefrom except to one who was proprietor of the lands at the time it was erected. The judge refused to so instruct, and the jury returned a verdict for the plaintiff, to which the defendant excepted.

J. A. Aiken, for the defendant.

C. C. Conant, for the plaintiff.

C. ALLEN, J. The defendant, in the construction of its railroad in 1880, brought together eight natural streams of water, and discharged them through one culvert, which was built under its road-bed, upon the land now owned by the plaintiff, at a different place from that where either of them originally flowed, and indeed three of the streams had never before flowed over this land at all. Under the instructions which were given to the jury, they must have found that this mode of discharging these streams of water upon the plaintiff's land was not necessarily adopted in the proper construction of the railroad. Since the building of the culvert, the waters of the brooks, and also an increased volume of surface water, have flowed through it, varying in quantity with the seasons, and possibly causing some damage to the land in question prior to the time of its purchase by the plaintiff, though this fact is not distinctly found; and at any rate, so far as appears, no action for such prior damage was ever brought. The plaintiff purchased the land in May, 1887, and in July and August of the same year there were heavy rains, and the plaintiff's land was overflowed, and sand deposited thereon, and the crop of hay injured; but no part of the land was rendered worthless, and it was only for the damage which thus occurred after his purchase that the plaintiff sought at the trial to recover.

The defendant does not contend, as indeed it could not successfully (*Curtis v. Eastern Railroad Co.*, 14 Allen, 55; 98 Mass. 428), that the injury suffered by the plaintiff is not in its nature a proper subject of recovery in an action at law; but the defense now rests upon the grounds that the action should have been brought once for all within six years after the defendant's wrongful act of building its railroad in an improper mode; that the right of action was in the original

owner, the plaintiff's grantor, who was entitled to recover not only the existing but all prospective damages to the land; that no action will lie in the name of the present plaintiff; and that the right of action is barred by the statute of limitations.

No doubt the former owner of the land might have sued at once for the invasion of his right by the discharge of the several natural streams of water upon his land in the manner stated, even though the damage was merely nominal; otherwise a right by prescription might be gained: *Jackman v. Arlington Mills*, 137 Mass. 277, 283; *Hooten v. Barnard*, 137 Mass. 36. But no such action was brought; and the question is, whether such an action must be brought within six years from the defendant's original wrongful act, or whether the injury is to be treated as a continuing one, for which the defendant may be held responsible after the expiration of six years.

If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner. That which was a nuisance at first does not lose its character as such by being continued for six years, whatever effect the lapse of time might have upon equitable remedies for its removal; and the maintenance of a structure which will continue to cause a wrongful diversion of water upon the plaintiff's land, in quantities varying with the seasons, is a continuing nuisance, and an invasion of the plaintiff's right from day to day, and he may select his own time for bringing an action therefor, and he is not barred by the lapse of six years from the erection of the structure. The case falls within the ordinary rule applicable to continuing nuisances and continuing trespasses: *Prentiss v. Wood*, 132 Mass. 486; *New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Uline v. New York Central and Hudson River R. R. Co.*, 101 N. Y. 98, 109; 53 Am. Rep. 123 et seq.; *Reed v. State*, 103 N. Y. 407, 414; *Delaware and Raritan Canal Co. v. Wright*, 21 N. J. L. 469; *Bare v. Hoffman*, 79 Pa. St. 71; *Holmes v. Wilson*, 10 Ad. & E. 503; *Battishill v. Reed*, 18 Com. B. 696; *Whitehouse v. Fellowes*, 10 Com. B., N. S., 765; *Devery v. Grand Canal*, 1 R. 9 C. L. 194.

In *Fowle v. New Haven and Northern Co.*, 107 Mass. 352, 112 Mass. 334, a case in some respects resembling this, the plain-

tiff had brought a former action, in which he expressly declared for prospective damages, and he was allowed by the court to recover them, apparently without any objection on this ground from the defendant; and if he had been allowed to hold his second verdict, he would have got double damages, which clearly was not permissible. The decision of that case does not necessarily imply that an action must have been brought within six years, or if it does, we cannot follow it; and we have no occasion to consider whether ordinarily prospective damages would be recoverable in such a case or not. No question of the measure of damages is before us.

Exceptions overruled.

NUISANCE, CONTINUING LIABILITY FOR. — See note to *Allen v. De Groodt*, 14 Am. St. Rep. 630, for liability for nuisances of a permanent character. Every continuance of a nuisance, or recurrence of the injury, is an additional nuisance, forming in itself the subject-matter of a new action: *Sloggy v. Dilworth*, 38 Minn. 179; 8 Am. St. Rep. 657; *Hills v. American Acad. of Music*, 120 Pa. St. 608; 6 Am. St. Rep. 739, and note. Compare note to *Chicago etc. R. R. Co. v. Lorb*, 59 Am. Rep. 351-369.

NUISANCES — LAPSE OF TIME. — Lapse of time will not legalize a public nuisance: Note to *Fort Smith v. McKibben*, 48 Am. Rep. 24-38; for no nuisance is legalized by length of time: *Dybert v. Schenck*, 23 Wend. 445; 35 Am. Dec. 575, and note. In an action against a railroad company for obstructing water and overflowing land, the right of action does not accrue necessarily at the time the obstruction was first built, and the plea of the statute of limitations is properly withheld from the jury, when it appears that at that time the damages could not have been foreseen and estimated: *Bullens v. Chicago etc. R'y Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501. See also *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213; *Ohio etc. R'y Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532, and note 537-540. But in *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, it was decided that the right by prescription to maintain a culvert, so constructed as to cause plaintiff's land to be overflowed, may be acquired by a railroad company by user for twenty years.

PEARSON v. ALLEN.

[151 MASSACHUSETTS, 72.]

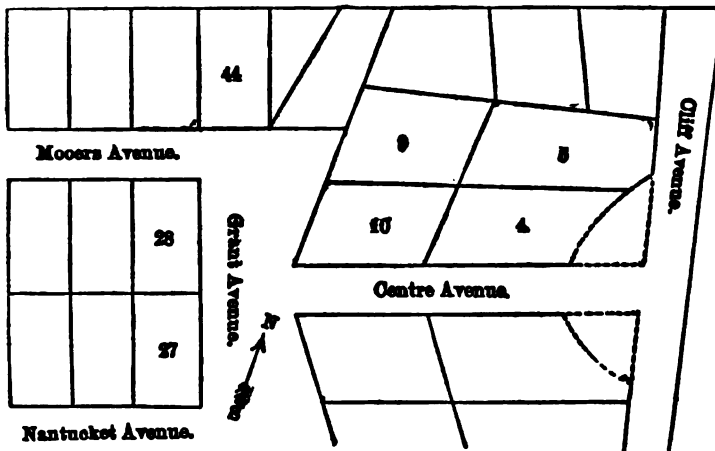
STREETS DEDICATED BY MAPS. — Laying out a large tract of land, and cutting it up into house lots and ways, does not give every purchaser of a lot a right of way over every street. He has no right to insist upon the keeping open of a street which does not connect his lands with the public highway, and which is desirable because it is nearest the water and in full view thereof.

DEDICATION BY MAPS. — Including a space upon a map with dotted lines is not a sufficient indication that it is to be kept open for the benefit of the public or of a purchaser of lands in the tract represented on the map.

PUBLIC EASEMENTS, ACTION BY PRIVATE PERSON FOR OBSTRUCTION OF. —

Though lands are dedicated to public use as streets and ways, their obstruction as such will not give a cause of action to a private person, unless he suffers private damages.

BILL in equity to prevent the obstruction of plaintiff's use of certain ways. Lands at Nantucket Bluff were laid out on a plan which was recorded, and according to which lots were sold. The plan, so far as material to this cause, was as follows: —



North Street, which is not shown on this plan, was situated about two hundred feet westerly from the part represented on the plan. Plaintiff owned lots 27, 28, and 44, and the defendant lots 4, 5, 9, and 10.

J. Brown, for the plaintiff.

C. Almy, for the defendant.

HOLMES, J. The plaintiff and the defendant are both owners of building lots sold with reference to the same plan, which displays a large tract cut up into house lots and ways. The only public way near the tract is North Street, which is shown on the west side of the plan. The plan shows ways leading directly to this street from the plaintiff's lots. Her lots also are drawn as abutting upon a way called Grant Avenue, from which there is delineated, extending in an opposite direction from North Street, a way called Centre Avenue, which begins directly opposite two of the plaintiff's lots, at a distance of 55 feet, on the other side of Grant Avenue, and leads 181 feet to another way, laid down as Cliff Avenue. Neither

Centre Avenue nor Cliff Avenue leads to any public street, but from Cliff Avenue there is an agreeable view of the sea, without, however, any access to it. The defendant owns all the land on the north of Centre Avenue, and has inclosed about one quarter of the avenue in width, throughout its whole length. He also has inclosed a triangle at the corner of Centre and Cliff avenues, which, on the plan, appears bounded by dotted lines. The two sides of the triangle on the streets continue the side lines of the streets in the same directions until they meet at the corner, but the rest of the street lines are unbroken. The plaintiff seeks an injunction against such inclosures or obstructions.

The only question worthy of discussion is, whether the private rights of way, if any, to which the plaintiff is entitled by reason of the reference to the plan in her deeds, extend to Centre Avenue. We are of opinion, on the whole, that they do not. The cases here and elsewhere show that there are limits to the easements raised in this way by implication, even if there are not limits to the power of creating easements when it is attempted by express words. A reference to a plan like this, laying out a large tract, does not give every purchaser of a lot a right of way over every street laid down upon it. In *Regan v. Boston Gas Light Co.*, 137 Mass. 37, a case somewhat like the present, it was held that the defendant could close a whole series of streets shown on the plan, leaving open the private ways adjoining the plaintiff's lots to the highway in one direction, and to the next side-street in the other. No doubt a grantee sometimes may be entitled to have ways kept open which his land does not touch, if they are necessary or convenient in order to reach a highway: *Fox v. Union Sugar Refinery*, 109 Mass. 292; and he may have like rights in a way which his land does touch on the side not leading to the highway: *Rodgers v. Parker*, 9 Gray, 445. But Centre Avenue does not lead to a highway, and the plaintiff's land does not touch it. We do not mean that these circumstances would be conclusive in all cases. If Cliff Avenue were on the border of the ocean, there would be strong reason for saying that in a plan for a seaside resort access to the ocean was very nearly as important as access to the public streets: See *Higginson v. Nahant*, 11 Allen, 530, 535. But the plaintiff does not make out that case. The most that she alleges is, "that the land on Cliff Avenue is nearest the water, and in full view thereof," and that the right to use that avenue and the triangle in corner-

tion with her cottages is of substantial pecuniary value. With some hesitation, we feel bound to decide that the value of a right of access for purposes of prospect is not a sufficient reason to extend her right of way over Centre Avenue.

It follows, *a fortiori*, that the plaintiff has no easement to have the triangle kept open. Moreover, the dotted lines on the plan are not a sufficient indication that it was to be kept open. They divide it from the adjacent ways, and the fact that they are not unbroken, as elsewhere on the plan, at most only raises a doubt as to the intentions of the owner: See *Attorney-General v. Whitney*, 137 Mass. 450. Whether there are other objections still, we need not consider.

It was argued for the plaintiff that the ways and the triangle were dedicated to the public by the making and recording of the plan, and the sale of lots with reference to it. The suggestion is answered, so far as the triangle is concerned, by what we have said already; and as to the ways, at least, those acts were not sufficient to dedicate them in this commonwealth: Pub. Stats., c. 49, sec. 94; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 332; *Morse v. Stocker*, 1 Allen, 150; *Hayden v. Stone*, 112 Mass. 346; *Abbott v. Cottage City*, 143 Mass. 521, 524; 58 Am. Rep. 143. Furthermore, a dedication to the public alone would confer no private easement on the plaintiff. She would have no private right of action for the public nuisance, unless she suffered private damage, which it is at least doubtful whether the loss caused by these obstructions would be, under our decisions: *Hartshorn v. South Reading*, 3 Allen, 501; *Willard v. Cambridge*, 3 Allen, 574; *Smith v. Boston*, 7 Cush. 254, 255; *Brainard v. Connecticut River R. R. Co.*, 7 Cush. 506, 510; *Geer v. Fleming*, 110 Mass. 39; *Brayton v. Fall River*, 113 Mass. 218; 18 Am. Rep. 470; *Thayer v. New Bedford R. R. Co.*, 125 Mass. 253, 257; *Breed v. Lynn*, 128 Mass. 367, 370.

Bill dismissed.

PUBLIC NUISANCES — RIGHT OF ACTION BY PRIVATE PERSON. — Public nuisances can be abated by a private person only when they obstruct his private right, or interfere at the time with his enjoyment of a right common to many, as the right of passage on a public highway, and he thereby sustains a special injury: *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813; note to *Jackson v. Kiel*, 16 Am. St. Rep. 209.

STREETS — MAPS. — One who purchases a lot bounded by streets marked upon a map or plat is entitled to a right of way over such streets: *Moose v. Carson*, 104 N. C. 431; 17 Am. St. Rep. 681. The mere marking of a street upon an unrecorded map does not necessarily constitute a dedication of the street: *People v. Reed*, 81 Cal. 70; 15 Am. St. Rep. 22.

LANE v. MOORE.

[151 MASSACHUSETTS, 87.]

EVIDENCE. — DECLARATIONS OF A TESTATOR OR A DONOR are admissible in evidence, not for the purpose of establishing the truth of his statements, but merely to show the condition of his mind; and they are admissible for this latter purpose only when they are sufficiently near in point of time to be of some value in determining his mental condition when he did some act which is assailed for his want of capacity.

EVIDENCE. — WHETHER DECLARATIONS MADE BY A DONOR OR TESTATOR are sufficiently near in point of time to warrant their being submitted to a jury, as tending to show his mental condition when he did some act which is questioned on the ground of his incapacity, rests chiefly in the discretion of the presiding judge. Generally, his determination of this preliminary question must be accepted as conclusive, where it is not shown that he has misapplied any principle of law.

EVIDENCE — DECLARATIONS. — Where defendant claimed that a note was given him in the month of August by the holder, who was then nearly eighty-four years of age, and whose business adviser and manager defendant was, it is competent, in an action by an administrator of the donor to recover the note on the ground that it was procured by fraud and undue influence, to prove declarations of the donor, in the months of September and November, after making the alleged gift, inconsistent with his having made the gift, and denouncing defendant as a rascal, where the purpose for which the declarations are claimed to be offered is to show the mental condition of the donor at the time of the alleged gift.

ACTION of tort by the administrator of the estate of Nathan Fellows, for the conversion of a promissory note. The intestate died September 10, 1887, aged eighty-four years and four months. For several years before his death he had not worked at his trade, and from May, 1884, until his death, the defendant acted as his business manager and adviser. The defendant testified that in August, 1884, he loaned his father-in-law, one Todd, five thousand dollars of the intestate's money, with the latter's consent, and took a note, for the conversion of which this action is brought; that the note was renewed five times, and the interest paid by Todd to the defendant, who paid it to the intestate; that on August 7, 1887, the intestate sent for defendant, expressed his belief that he had not long to live, and told defendant that he wished to give him the note, and to carry out this purpose, he wrote his name on the back of the note, and told defendant that he wished him to have it and keep it. The plaintiff's claim was, that no gift had been made, or if made, that it was procured by fraud and undue influence. Among other evidence offered in behalf of plaintiff, and received against defendant's objection, was that

of one Ricker, who testified to a conversation held November 4, 1887, with the testator, in which the latter declared that he might as well spend his money as to leave it to be quarreled about; that he wished to spend some of it for curbstones around a cemetery lot, and that he proposed to have his will made; and also the testimony of one Dennison, of a conversation with the intestate in the early part of September, 1887, in which the latter showed a memorandum regarding the Todd note, in defendant's handwriting, and asked witness, "What do you think of that?" and said, "It was a damnable thing; that he could put Moore through for it, and shut him up"; and further declared that he knew nothing about Todd, and had nothing to show for the five thousand dollars. Plaintiff also testified, against defendant's objection, that in the early part of the same month the intestate said that defendant had let Todd "have some of his money, and he hadn't anything to show for it," and that defendant was a great rascal, and he should hold him accountable. Verdict for plaintiff. Defendant excepted.

W. S. Knox and H. F. Hurlburt, for the defendant.

E. T. Burley and W. A. Pew, Jr., for the plaintiff.

C. ALLEN, J. The only question argued is as to the competency of the declarations made by the plaintiff's intestate after the time of the alleged gift to the defendant. Where the mental condition of a person at a particular time is in issue, his appearance, conduct, acts, and declarations, after as well as before the time in question, have been held admissible in evidence if sufficiently near in point of time, and if they appear to have any tendency to show what that mental condition was. The question has usually arisen in cases involving the validity of wills, but the principle is the same where the validity of a gift is questioned, and where responsibility for crime is to be determined: *Shailer v. Bumstead*, 99 Mass. 112, 122, 123; *Lewis v. Mason*, 109 Mass. 169; *May v. Bradlee*, 127 Mass. 414, 420; *Potter v. Baldwin*, 133 Mass. 427, 429; *Whitney v. Wheeler*, 116 Mass. 490; *Commonwealth v. Pomeroy*, 117 Mass. 143, 148; *Commonwealth v. Damon*, 136 Mass. 441, 448. So where the question was whether a testator by canceling a will intended to revive a former will, it was considered that his subsequent declarations were competent for the purpose of showing what his intention was: *Pickens v. Davis*, 184 Mass. 252, 257, 258; 45 Am. Rep. 322, and cases there cited. In all

such cases, the evidence is received merely for the purpose of throwing light upon the state of mind of the person at the time in question, and not as tending to establish the truth of any facts which may have been stated by him.

There are certain proper limitations to the admissibility of such evidence. One is, that the matters testified of should be sufficiently near in point of time, so that the testimony may be of value in determining the question which is directly in issue. Another proper limitation is, that the testimony should appear to have some natural bearing upon the mental condition of the person, or his intention at the particular time which is immediately involved in the issue.

It is contended by the defendant that some portion of the testimony which was admitted against his objection failed to conform to the latter of the requirements above mentioned, and that the judge erred in allowing it to go to the jury. Ordinarily, questions of this character must in the first instance be determined by the presiding judge as questions of fact, and if his determination is in favor of admitting the testimony, it then goes to the jury for them to decide as to its weight. For example, the judge will determine whether the time is so remote, or whether the circumstances have so changed, that declarations then made would not be deemed satisfactory evidence tending to show the person's condition at the earlier period. Evidence was excluded for this reason in *Davis v. Davis*, 123 Mass. 590, 598, and in *White v. Graves*, 107 Mass. 325. Where, in determining a preliminary question of this description, there is no erroneous application of any principle of law, it is difficult for us, upon a bill of exceptions which merely presents questions of law, to reconsider and reverse the decision. The matter necessarily rests chiefly in the discretion of the presiding judge. Usually, the question is not strictly a legal one. The judge determines, chiefly as a question of fact, whether, under all the circumstances, the testimony bears a sufficiently close relation to the question in issue to render it proper to be considered by the jury, and ordinarily his determination of this preliminary question must be accepted as conclusive: *Shailer v. Bumstead*, 99 Mass. 112, 130; *Commonwealth v. Coe*, 115 Mass. 481, 505; *Commonwealth v. Abbott*, 130 Mass. 472, 474; *Commonwealth v. Robinson*, 146 Mass. 571, 580.

In the present case, it is impossible to say that the judge has misapplied any rule of law. There was enough evidence

of an impairment of the mental faculties of the plaintiff's intestate, before and at the time of the alleged gift to the defendant, to warrant the introduction of evidence as to his condition afterwards. He was almost eighty-four years old. For several years he had not worked at his trade. For over three years the defendant had been his business manager and adviser, and the custodian of his title deeds and bank-books. His conduct in allowing the defendant to manage his property in the manner testified to, and above all, the alleged gift itself, under the circumstances stated by the defendant, would naturally awaken a suspicion that the faculties of the plaintiff's intestate were so far impaired as to make him readily susceptible to influence and pressure. A foundation being thus laid, the plaintiff might properly show his condition afterwards. In order to show this, anything said or done by the plaintiff's intestate, or in his presence, with his conduct or comment thereupon, would, in its nature, be admissible. There was no such lapse of time, or marked change in his condition, as to enable us to say that the evidence should have been excluded. Nor can we say that any of his declarations, as testified to, had no natural bearing upon his previous mental condition. Impairment of mental faculties in particular cases may be indicated by lack of self-control, by undue excitement, by anger, by forgetfulness, or by the use of strong expressions or expressions of astonishment at what has taken place. The fact that such expressions reflected upon the defendant may have been disadvantageous to him in the trial, but it did not render the testimony incompetent. Its weight, of course, was for the jury, who were carefully and more than once instructed that any subsequent statements were not to be considered as tending to prove fraud, or to show that the facts were as stated, but only as bearing upon the state of mind of the plaintiff's intestate. Upon the whole case, we see no error in matter of law.

Exceptions overruled.

EVIDENCE — DECLARATIONS OF DECEASED PERSONS. — As to when the declarations of a deceased person are admissible to show the state of his mind at the time of making a will, see note to *Roberts v. Trumbick*, 52 Am. Dec. 167-169; *Waterman v. Whitney*, 11 N. Y. 157; 62 Am. Dec. 71, and note 80, 81; *Thompson v. Ish*, 90 Mo. 150; 17 Am. St. Rep. 552; *Herster v. Herster*, 122 Pa. 229; 9 Am. St. Rep. 95.

AM. ST. REP., VOL. XXI.—28

GAY v. ROOKE.

[151 MASSACHUSETTS, 11A.]

PROMISSORY NOTE MUST CONTAIN ON ITS FACE AN EXPRESS PROMISE TO pay money. A mere promise implied by law, founded on an acknowledgment of indebtedness, is not sufficient.

PROMISSORY NOTE, WHAT IS NOT. — "I O U, E. A. Gay, the sum of seventeen dolla. $\frac{5}{100}$ for value received," though signed by the writer, is not a promissory note, but a mere acknowledgment of indebtedness.

INTEREST. — In general, where there is a loan without any stipulation to pay interest, and where one owes money to another, having been guilty of no wrong in obtaining and no default in retaining it, interest is not chargeable. Therefore interest cannot be collected on an I O U, where there has been no demand for its payment.

CONTRACT on a writing which the plaintiff declared on as a promissory note, and which was in words and figures as follows: —

"MARLBORO', Sept. 23, 1881.

"I O U, E. A. Gay, the sum of seventeen dolla. $\frac{5}{100}$ for value received.

JOHN R. ROOKE."

The only subject of contention was, whether plaintiff was entitled to interest from the date of the instrument or from the service of the writ. Upon this subject, the judge ruled against the plaintiff, and the defendant excepted.

H. S. Fay, for the plaintiff.

I. B. Forbes and C. S. Forbes, for the defendant.

DEVENS, J. In order to constitute a good promissory note, there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law, founded on an acknowledged indebtedness, will not be sufficient: Story on Promissory Notes, sec. 14; *Brown v. Gilman*, 13 Mass. 158. While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom: *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21. In this view, the instrument sued on cannot be considered a promissory note. It is an acknowledgment of a debt only, and although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. It was therefore held in *Gray v. Bowden*, 23 Pick. 282, that a memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and

due," signed by the maker and attested by a witness, was not a promissory note signed in the presence of an attesting witness within the meaning of the statute of limitations. In England, an I O U, there being no promise to pay embraced therein, is treated as a due-bill only. The cases, which arose principally under the stamp act, are very numerous, and they have held that such a paper did not require a stamp, as it was only evidence of a debt: 1 Daniel on Negotiable Instruments, 3d ed., sec. 36; 1 Randolph on Commercial Paper, sec. 88; *Fesenmayer v. Adcock*, 16 Mees. & W. 449; *Melanotte v. Teasdale*, 13 Mees. & W. 216; *Smith v. Smith*, 1 Fost. & F. 539; *Gould v. Coombs*, 1 Com. B. 543; *Fisher v. Leslie*, 1 Esp. 425; *Israel v. Israel*, 1 Camp. 499; *Childers v. Boulnots*, Dowl. & R. 8; *Beeching v. Westbrook*, 8 Mees. & W. 411.

While in a few states it has been held otherwise, the law as generally understood in this country is, that in the absence of any statute, a mere acknowledgment of a debt is not a promissory note, and such is, we think, the law of this commonwealth: *Gray v. Bowden*, 23 Pick. 282; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21; *Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342; *Carson v. Lucas*, 13 B. Mon. 213; *Garland v. Scott*, 15 La. Ann. 143; *Currier v. Lockwood*, 40 Conn. 349; 16 Am. Rep. 40; *Brenzer v. Wightman*, 7 Watts & S. 264; *Biskup v. Oberle*, 6 Mo. App. 583. Some states have by statute extended the law of bills and promissory notes to all instruments in writing whereby any person acknowledges any sum of money to be due to any other person: 1 Randolph on Commercial Paper, sec. 88; Ill. Rev. Stats. 1884, c. 98, sec. 3; Col. Gen. Stats. 1883, c. 9, sec. 3; Ind. Rev. Stats. 1881, sec. 5501; Iowa Code, 1873, sec. 2085; Miss. Rev. Code 1880, secs. 1123, 1124.

We have no occasion to comment upon those instruments in which words have been used or superadded from which an intention to accompany the acknowledgment with a promise to pay has been gathered, or where the form of the instrument fairly led to that conclusion: *Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342. No such words exist in the instrument sued, nor is it in form anything but an acknowledgment. The words "for value received" recite, indeed, the consideration, but they add nothing which can be interpreted as a promise to pay. It is therefore unnecessary to consider whether, if the paper were a promissory note, interest should be calculated from its date. Upon this point

we express no opinion. If it is to be treated as an acknowledgment of debt only, as we think it must be, the plaintiff is not entitled to interest except from the date of the writ. Even if it was the duty of the defendant to have paid the debt on demand, yet if no demand was made, if no time was stipulated for its payment, if there was no contract or usage requiring the payment of interest, and if the defendant was not a wrong-doer in acquiring or detaining the money, interest should be computed only from the demand made by the service of the writ: *Dodge v. Perkins*, 9 Pick. 368; *Hunt v. Nev-ers*, 15 Pick. 500; 26 Am. Dec. 616. "In general," says Chief Justice Shaw, "when there is a loan without any stipulation to pay interest, and where one has the money of another, having been guilty of no wrong in obtaining it, and no default in retaining it, interest is not chargeable": *Hubbard v. Charles-town B. R. R. Co.*, 11 Met. 124; *Carlton v. Bragg*, 15 East, 222; *Shaw v. Picton*, 4 Barn. & C. 715; *Moses v. Macpherlan*, 2 Burr. 1005; *Walker v. Constable*, 1 Bos. & P. 306.

Exceptions overruled.

PROMISSORY NOTE, WHAT CONSTITUTES: See *Kraft v. Thomas*, 123 Ind. 513; 18 Am. St. Rep. 345; note to *Chandler v. Carey*, 8 Am. St. Rep. 815. "\$1,000.

GRASS VALLEY, July 8, 1882.

"Three years from date, I promise to pay Daniel Strickland, for value received, in United States gold coin, at the rate of ten per cent per annual.

"DANIEL P. HOLBROOKE.

"ELLEN E. HOLBROOKE."

— is a promissory note: *Strickland v. Holbrooke*, 75 Cal. 268.

"MILFORD, April 8, 1887.

"Cunningham and Madden, let W. Marshall have one bay horse, eight years old, known as the Cunningham horse, for \$150. Fifty dollars by the 15th of April, 1887, and one hundred dollars by the first of August; that said Cunningham and Madden should hold the horse until paid for.

"WM. H. MARSHALL."

— is a conditional note, valid only between the original parties, unless recorded like a chattel mortgage: *Cunningham v. Trevitt*, 82 Me. 145. A promissory note made by an Indian living upon an Indian reservation is an enforceable obligation, where it conforms to the manners and customs of the Indian tribe: *Ke-tuc-e-mun-quah v. McClure*, 122 Ind. 541. A promissory note may be valid with the payee's name left blank; for the blank may be filled by any *bona fide* holder with his own name: *Thompson v. Rathbun*, 18 Or. 202. A treasury warrant is in legal effect but a promise to pay: *State v. Wilson*, 71 Tex. 291. A due-bill is a written obligation for the payment of money: *White v. Card*, 86 Ky. 191; *Rhodes v. Pray*, 36 Minn. 392.

PROMISSORY NOTE, WHAT DOES NOT CONSTITUTE: See *Chandler v. Carey*, 64 Mich. 237; 8 Am. St. Rep. 814, and note; *Ferguson v. Staples*, 82 Me. 159; 17 Am. St. Rep. 470, and note; *Burgess v. Fairbanks*, 83 Cal. 218; 17 Am. St. Rep. 230, and note; note to *Jennings v. First Nat. Bank* 16 A.

St. Rep. 214, 215. An agreement to pay a certain sum of money on a certain day, upon condition that the sale of the property for a part of the purchase price of which it was given shall cause the debt at once to mature, is not a negotiable promissory note: *First Nat. Bank v. Carson*, 60 Mich. 432.

INTEREST—DEMAND. —Interest dependant on demand: *Note to Selleck v. French*, 6 Am. Dec. 194, 195.

LEONARD v. LEONARD.

[151 MASSACHUSETTS, 151.]

DIVORCE BECAUSE OF THE IMPRISONMENT OF DEFENDANT in a state prison, or in a jail or house of correction, will not be granted when such imprisonment is in another state. The statute making imprisonment a cause for divorce means imprisonment in this state for some offense known to the laws thereof.

A. P. Worthen, for the libelant.

No counsel appeared for the libelee.

C. ALLEN, J. The libelant seeks a divorce from her husband on the ground that he has been sentenced to imprisonment at hard labor in the state prison at Waupun, Wisconsin, for a term of seven years and six months; and the question presented to us is, whether such a sentence, passed in another state, is a good cause of divorce here. The Public Statutes, chapter 146, section 2, provide that a divorce may be decreed "when either party has been sentenced to confinement at hard labor for life, or for five years or more, in the state prison, or in a jail or house of correction." The first statute in this commonwealth making a sentence to imprisonment a cause of divorce was the Revised Statutes, chapter 76, section 5, where the language is substantially the same as that quoted above, except that the term required is seven years or more. Desertion was not made a cause of divorce till afterwards, by the statute of 1838, chapter 126, and it is therefore apparent that the sentence to imprisonment was not deemed merely to be substantially equivalent to a desertion. It imported an offense the nature of which was known to the legislature. Imprisonment elsewhere might be for a cause punishable here for a less term, or possibly not punishable here at all. The term "the state prison," when used without further description, in the Revised Statutes as well as in the more recent legislation, means the state prison of this commonwealth: *Beard v. Boston*, 151 Mass. 96. No instance to the contrary has been cited to us, and we do not now recall any. If a state prison elsewhere was

intended, it would be natural to say so in distinct language, as in the Revised Statutes, chapter 144, section 34. A sentence to imprisonment elsewhere is not included as a cause of divorce, within the meaning of the Public Statutes, chapter 146, section 2: *Martin v. Martin*, 47 N. H. 52, 53.

Libel dismissed.

DIVORCE. — CONVICTION OF A FELONY, AND IMPRISONMENT IN THE STATE PENITENTIARY as a ground for divorce, see note to *Hamaker v. Hamaker*, 65 Am. Dec. 708-725.

CIRIACK v. MERCHANTS' WOOLEN COMPANY.

[151 MASSACHUSETTS, 182.]

MASTER AND SERVANT. — AN EMPLOYER IS UNDER NO OBLIGATION TO WARN an employee of danger which is obvious, nor to instruct him in matters which he may fairly be supposed to thoroughly understand. Nor is it the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it. It is the duty of the servant to use care proportionate to the dangers of his situation as he understands it; and if he fails to do so, the fault is his, and not his master's.

MASTER AND SERVANT. — IF THE WORK OF A SERVANT EXPOSES HIM TO DANGER of which he is ignorant, and which, from his youth and inexperience, he is incapable of comprehending without assistance, it is the duty of the master, if he knows or ought to know of it, to give him such warning and instruction as is necessary for his safety. To determine a master's duty, the inquiry must be, What instruction does the servant appear to need?

MASTER AND SERVANT. — IF A BOY TWELVE YEARS OF AGE is employed, and is of less than the average intelligence of boys of his age, and the defendant knew or ought to have known this, and he is put to work in a place dimly lighted, in the same room with machinery with rapidly revolving gearing, and is told to go between the machines and to get a tool, and to hurry, and some part of his clothing is caught in the gearing, and he is drawn in and injured, there is sufficient evidence of negligence to warrant the submission of the case to the jury, if the injured boy had not been working upon or near the dangerous machinery, and was sent for the tool, without being given any warning or instruction concerning the danger attendant upon his getting into a position which it was necessary for him to assume in getting the tool.

ACTION of tort for personal injuries. The same case was before this court, and was reported in 146 Mass. 182; 4 Am. St. Rep. 307. Plaintiff was injured by being caught in the gearing of certain machinery, at a point three and a half feet from the floor. He and other boys were in the finishing-room, and his duty was to take cloth from an apron on the back of

the finishing-shears, and wheel it in trucks to another room, and to take cloth from racks and wheel it to the shears and fasten it upon the apron. He was not required to go between the gigs, or to have anything to do with them. They were cylindrical machines, about five feet high and square, and having upon one side gearing, in plain sight, consisting of three cog-wheels, each eighteen inches in diameter, and one small cog-wheel an inch and a half in diameter. The plaintiff was twelve years and two months old. On the morning of the accident, Miller, overseer in defendant's employment, spoke to plaintiff sharply, telling him to get a punch that had been left by Miller between two gigs, and to hurry up about it. The plaintiff undertook to obey Miller, hurrying as fast as he could, and went in between two gigs, a place where he had never been before, and began to look for the punch, and because he could not see anything while standing up, he stooped down. As he raised himself up, the sleeve of his jacket was caught in the gearing, and his arm drawn in and injured. He testified that he did not, when he went in between the machines, realize that there was any danger, and that he had never received any instruction or warning with reference to the danger of the machinery or gearing. There was also evidence to show that the plaintiff was a boy of less than average intelligence, and that the place where the accident occurred was dimly lighted. The defendant requested the judge to rule that the jury would not be justified in returning a verdict for the plaintiff. This the judge refused to do, and submitted the case to the jury, who returned a verdict for the plaintiff.

R. M. Morse, Jr., and H. G. Nichols, for the defendant.

H. W. Bragy and E. Greenhood, for the plaintiff.

KNOWLTON, J. This case has once before been considered by this court (see 146 Mass. 182; 4 Am. St. Rep. 307), and on the testimony then presented it was not easy to determine, as it is not now upon slightly different testimony, whether there was any evidence of negligence on the part of the defendant. The only negligence alleged is the failure to warn the plaintiff of the dangers to which he was subjected in doing his work.

An employer is under no obligation to warn an employee of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed thoroughly to understand. Nor is it the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the im-

portance of using care to avoid it. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it; and if he fails to do so, the fault is his, and not his master's. But where the work of a servant exposes him to danger of which he is ignorant, and which, from youth or inexperience, he is manifestly incapable of comprehending without assistance, it is the duty of his master, if he knows or ought to know of it, to give him such warning and instruction as are necessary for his safety. In determining the master's duty in such a case, the inquiry is, What instruction does the servant appear to need? Is there reason to believe him ignorant of anything which, for his protection, he ought to know, or incapable of appreciating the risks from what he sees around him? In the absence of anything to show the contrary, the master has a right to assume that he knows those facts of common experience with which ordinary persons of his age and appearance are familiar. In hiring a boy twelve years of age, and apparently of average intelligence, an employer is not called upon to tell him that if he holds his hand in fire it will be burned, or strikes it with a sharp instrument it will be cut, or thrusts it between the teeth of revolving cog-wheels in the gearing of a mill it will be crushed. From infancy and through childhood, as well as in later life, we are all making observations and experiments with material substances, and every person of ordinary faculties acquires knowledge at an early age of those familiar facts which force themselves on our attention through our senses.

There is nothing in this case to warrant a jury in finding the defendant negligent in omitting to tell the plaintiff that there were cog-wheels on the gig, or that the machinery would injure him if he allowed his hand or arm to get into the gearing, or in failing to repeat a warning which had once been given, or to inform him of risks which he understood himself: *Williams v. Churchill*, 137 Mass. 243; 50 Am. Rep. 304; *Russell v. Tillotson*, 140 Mass. 201; *Crowley v. Pacific Mills*, 148 Mass. 228; *Buckley v. Gutta Percha and Rubber Mfg. Co.*, 113 N. Y. 540. But the case presents itself in an aspect somewhat different from that which it wore at the former hearing. Besides some difference in the details of the testimony at the last trial, evidence was introduced from numerous witnesses, which, though contradicted, would warrant a jury in finding that the plaintiff was a boy of less than the average intelligence of boys of his age, and that the defendant knew it, or

from his appearance ought to have known it, before the accident. There was additional evidence that the place where he was injured was dimly lighted. The undisputed testimony at the former trial tended to show that he possessed at least the intelligence usual in boys of his age, and that fact was referred to in the opinion as one of the grounds of the decision.

It now appears that while he had worked for a considerable time in the room where the gearing was plainly visible, so that he was undoubtedly familiar with it in a general way, he had never worked so near it as to have occasion specially to consider the risk of getting his clothing caught in it, or the danger of being drawn into it and seriously injured, if some loose part of one of his garments should come in contact with it. There was evidence that a sleeve of his jacket was caught, and that his arm was thus drawn between the wheels. It seems to have been his duty to obey the overseer, who, as he testifies, told him to pick up the punch. The work took him to a place where he never had occasion to work before; the order was imperative, calling for haste. He had had no instruction, and it is not clear that he had had any observation or experience which showed the danger that, in getting down and looking under the machine, and getting up again, some part of his clothing might come in contact with the gearing, and be caught, and draw his hand or arm between the wheels.

On the whole, we are of opinion that there was some evidence to submit to the jury on the question whether the plaintiff was not obviously in need of information as to this risk. On similar grounds the plaintiff was allowed to go to the jury and receive a verdict in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 3 Am. Rep. 506. See also *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Glover v. Dwight Mfg. Co.*, 148 Mass. 22; 12 Am. St. Rep. 512; *Swoboda v. Ward*, 40 Mich. 420; *Huizega v. Cutler and Savidge Lumber Co.*, 51 Mich. 272; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298.

There was evidence for the jury upon the question whether the plaintiff was in the exercise of due care.

Judgment on the verdict.

MASTER AND SERVANT—DUTY OF MASTER TO WARN SERVANT.—The master must inform his servant of any extra hazard or danger to which he may be subjected: *Missouri P. R'y etc. Co. v. White*, 76 Tex. 102; 18 Am. St. Rep. 33, and note. For a servant assumes only such risks as are ordinarily incident to the employment, and such dangers or defects in machinery as are plainly obvious, and no others, concerning which he has not been fully ad-

vised: *Rummel v. Dikworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827, and notes; *Galveston etc. Ry Co. v. Garrett*, 73 Tex. 262; 15 Am. St. Rep. 781, and notes; *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708; 13 Am. St. Rep. 84.

MASTER AND SERVANT — MINOR SERVANTS. — As to the master's duty to warn and instruct young and inexperienced servants, see *Rummel v. Dikworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827, and notes.

CHADWICK v. COVELL.

[151 MASSACHUSETTS, 190.]

PATENT MEDICINES. — THERE CAN BE NO EXCLUSIVE RIGHT to the use of formulas for the manufacture of medicines, though there may be a right to prevent any one from obtaining or using them through breach of trust or of contract. Any one who honestly gets a knowledge of such formulas has the right to make and sell medicines therefrom, and to publish to the public that they are made according to such formulas.

TRADE-MARKS, RIGHT TO RESTRAIN USE OF. — WHERE A PATENT MEDICINE is manufactured and sold by a physician, who dies, and another person becomes possessed of his formulas and acquires the right to his trade-mark, he cannot maintain a suit to restrain another person from making and selling medicines from the same formulas, nor from using the trade-mark, because the only use of a trade-mark, after the death of the original proprietor, is to indicate that the medicines sold are of the same class as those which he manufactured, and therefore one person has no right to enjoin another from using them, where his use is not a fraud upon the public, nor an invasion of the exclusive right of any other person.

E. L. Barney, for the plaintiff.

E. Avery and T. F. Desmond, for the defendant.

HOLMES, J. This is a suit brought for an injunction and damages in respect to the defendant's manufacture and sale of certain medicines under the name of "Dr. Spencer's Queen of Pain," and "Spinal Paste, or Salt Rheum Cure," and his use of alleged trade-marks for the same. Issues were framed for the jury on the question whether the plaintiff was the owner of the formulas for the medicines and of the trade-marks used by Dr. Spencer, and these issues came on for trial. As the whole case was pending in the superior court, it is hardly to be supposed that it was understood that every question except those raised by the issues in their narrowest sense was left for trial at another time. It seems plain, at the least, that the rulings of the judge were made on the footing that the question before him was, whether the plaintiff had such an exclusive ownership as she alleged in her bill, and as entitled

her to an injunction, and that the judge was right in that understanding. If the issues were construed more narrowly than that, the trial by jury was a waste of time.

The plaintiff's case, on her evidence, is as follows: Dr. Spencer of New Bedford made these medicines according to certain secret formulas of his own, and sold them under the names mentioned. The plaintiff became intimate with him, and after his death Mrs. Spencer, his administratrix, said to the plaintiff that it was the doctor's wish and her wish that the plaintiff should have the formulas of the Queen of Pain and the Spinal Paste, and the trade-marks, and the circulars and labels, and everything that went with the Queen of Pain and the Spinal Paste, and that was her reward for her kindness. These formulas were written on paper. Mrs. Spencer handed them to the plaintiff, and she took them. At that time the plaintiff took some of the Queen of Pain that was manufactured and on hand. There was not any Spinal Paste made then. She took none of the labels at that time. Three days later, Mrs. Spencer died, and a teamster carried the rest of the medicine to the plaintiff's house. After that, the plaintiff began to manufacture and sell the medicines. The sisters and next of kin of Dr. Spencer and his administrator *de bonis non* subsequently signed papers purporting to ratify Mrs. Spencer's dealings with the plaintiff; the administrator using words implying that the plaintiff had a right, but not necessarily an exclusive right. The administrator also sold the plaintiff two dies used by Spencer for stamping packages of the Spinal Paste. After these transactions the administrator *de bonis non* conveyed by deed to the defendant, for two hundred dollars, Spencer's recipes and trade-marks for these medicines, excepting rights, not specified, theretofore granted by Spencer, Mrs. Spencer, or himself, and it seems had sold him molds for bottles for the Queen of Pain at a much earlier time. The defendant made and sold the medicines with labels like those used by Dr. Spencer. The judge ruled that the evidence would not support a decree for the plaintiff, directed the jury to answer the questions in the negative, ordered the bill to be dismissed, and reported the case.

So far as the right to manufacture and sell the medicines goes, the plaintiff's case may be disposed of in a few words. Dr. Spencer had no exclusive right to the use of his formulas. His only right was to prevent any one from obtaining or using

them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will: *Parbody v. Norfolk*, 98 Mass. 452, 458; 96 Am. Dec. 664; *Morison v. Moat*, 9 Hare, 241, 263; *Williams v. Williams*, 3 Mer. 157. The defendant got his knowledge honestly, and therefore has a right to make and sell the medicines.

Having the right to make and sell the medicines, the defendant has the right to signify to the public that the medicines are made according to the formulas used by Dr. Spencer. The only question is, whether the plaintiff has the right to restrain him from using Dr. Spencer's trade-marks. The defendant argues that an executor or administrator has no right to give away the estate coming to his hands, and therefore that the plaintiff got no title to any property of Dr. Spencer by Mrs. Spencer's dealings with her, since those dealings were, at most, a mere gift. But there has been no attempt to avoid the transaction on behalf of any one interested. The creditors of the estate have all been paid, and the next of kin assented to the gift. So far as this objection goes, we shall assume that even if the gift was a breach of duty on the part of Mrs. Spencer, it gave the plaintiff a title, as against third persons, to anything which it was otherwise competent to give her: *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368.

We assume for the purposes of our decision, but without expressing an opinion on either question, that what took place between Mrs. Spencer and the plaintiff purported to be a present gift of trade-marks, and that if the gift of a trade-mark in gross would have been good if by deed it would be equally good at common-law when made by parol. The old rule was, "Everything which is not given by delivery of hands must be passed by deed": *Noye's Maxims*, 62, c. 33; *Fairfax, J.*, in *Year Book*, 21 Hen. VII. 36, pl. 45; *Shep. Touch.* 229. But the formalities required by the early common law have been broken in upon a good deal, although more in England than in this state. It may be that later forms of property not admitting of delivery, but unknown to the old law or not then the subject of transfer, are free from the restraints of the ancient rule; just as, at Rome, later forms of property could be conveyed without the comparatively archaic ceremonies of mancipation. It may be that even an oral gift of incorporeal personal property would be sustained, although delivery is impossible from the nature of the case. But that question

we leave undecided: See Browne on Trade-marks, 2d ed., sec. 361, and note; Lowell on Transfer of Stock, sec. 43; 2 Kent's Com., 18th ed., 439; *Grover v. Grover*, 24 Pick. 261, 263; 35 Am. Dec. 319; *Bond v. Bunting*, 78 Pa. St. 210, 218; *Hewlins v. Shippam*, 5 Barn. & C. 221, 229.

We also refrain from considering whether the sale of the two dies to the plaintiff would not be sufficient to give her the right to use the marks upon them: *Stevens v. Gladding*, 17 How. 447, 452; and we pass to what seems to us the insuperable difficulty in the case.

What is the plaintiff's position, when she seeks to prevent the defendant from selling his medicine by the name of "Dr. Spencer's Queen of Pain"? She is not Dr. Spencer. She is not the owner of a manufactory once owned by him. She makes the medicine with her own ingredients, tools, plant, and contrivances. She has no exclusive right to make it. The defendant's use of the name does not mislead the public any more than hers does as to the maker, the place of manufacture, or the nature or quality of the goods. Unless, therefore, it should be held that a trade-mark may be erected into a new species of property, capable of lasting as long as the world does and certain goods are manufactured, and of being transferred for value or by gift from person to person irrespective of good-will, special right to make the goods, place of manufacture, or fraud of any kind upon the public, the plaintiff cannot prevail.

Undoubtedly, the exclusive right to use a certain collocation of words or signs to designate a certain class of goods may have a considerable money value as an advertisement, but the fact that a right would have a money value, if it existed, is not a conclusive reason for recognizing the right. The exclusive right to particular combinations of words or figures, after they have been published, for purposes not less useful than advertising, for poetry, or the communication of truths discovered for the first time by the writer, for art or mechanical design, now, at least, is a creature of statute, and is narrowly limited in time. When the common law developed the doctrine of trade-marks and trade names, it was not creating a property in advertisements more absolute than it would have allowed the author of *Paradise Lost*; but the meaning was to prevent one man from palming off his goods as another's, from getting another's business, or injuring his reputation by unfair means, and perhaps from defrauding

the public. Indeed, the plaintiff would not claim an absolute property in the marks and names merely as such. She would not argue that she had a right to forbid their use for any purpose by others apart from the medicine, or in connection with some entirely different class of goods.

It is true that some judges, noticeably Lord Westbury, have preferred to rest the protection to trade-marks on the notion of property, rather than of fraud; but it is plain, upon reading his judgments, that he means no more than that the deception which equity will prevent need not have been intended, as when a man ignorantly adopts a trade-marks already in use, and that within certain limits a trade-mark may be sold, which nobody denies: *Hall v. Barrows*, 4 De Gex, J. & S. 150, 158; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137. The limitations are clearly marked by the language of Lord Cranworth and Lord Kingsdon in the latter case on appeal to the house of lords: 11 H. L. Cas. 523, 534, 538. See also *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, 29, et seq.; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 514, 519; *Ainsworth v. Walmsley*, L. R. 1 Eq. 518, 525; *Collins Co. v. Brown*, 3 Kay & J. 423, 426. At least as strict a rule is to be drawn from the Public Statutes, c. 76, sec. 1, and *Gilman v. Hunnewell*, 122 Mass. 139, 148.

If the nature and foundation of the right is what we suppose, then the reason why and the limits within which a grantee will be protected are plain. The most usual case is when a trade-mark means that goods come from a certain manufactory, and the manufactory and mark change hands together; e. g., *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Kidd v. Johnson*, 100 U. S. 617, 620. The use of the mark by a third person would be as much a fraud upon the grantee as it would have been upon his grantor; therefore the grantee will be protected: *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, 17; *Jennings v. Johnson*, 37 Fed. Rep. 364. But our decisions have gone no further: *Sohier v. Johnson*, 111 Mass. 238, 244. See *Cotton v. Gillard*, 44 L. J. Ch. 90; *Congress Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291, 302; 6 Am. Rep. 82; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321, 339; and cases *supra*.

It may be that similar principles would apply if the plaintiff had the exclusive right of manufacturing the medicines, although she was not strictly a successor to Dr. Spencer's business, and did not have his manufactory or plant: See

Morison v. Moat, 9 Hare, 241, 267; *In re Palmer's Trade-mark*, 24 Ch. Div. 504, 520; *Menendez v. Holt*, 128 U. S. 514, 520. But that is not this case. The only significance of Dr. Spencer's marks at the present time, by whomsoever used, is to indicate a class of goods which any one who knows how to do it may lawfully manufacture. The case more nearly resembles *Thomson v. Winchester*, 19 Pick. 214, 216; 31 Am. Dec. 135. See *Emerson v. Badger*, 101 Mass. 82, 86; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *In re Leonard and Ellis's Trade-mark*, 26 Ch. Div. 288; *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, 26, 27, 37, 38. There is a slight analogy, also, to the cases where a patentee has been denied the exclusive right to the name of his patented article as a trade-mark after the patent has expired: *Linoleum Mfg. Co. v. Nairn*, 7 Ch. Div. 884; *In re Palmer's Trade-mark*, 24 Ch. Div. 504, 517, 521; *In re Ralph's Trade-mark*, 25 Ch. Div. 194, 199; *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324. We are of opinion that assuming that there was a gift to the plaintiff, otherwise valid, of Dr. Spencer's trade-marks, it did not give her the right to prevent the defendant from using the same words and devices. Our decision makes the exclusion of evidence of Dr. Spencer's expressions of intention immaterial, although there seems to be no doubt that the evidence was properly excluded.

Decree affirmed.

PATENTS. — As to whether the inventor or discoverer of an invention will be protected in equity, see *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 664, and particularly note 669, 670. One who by pursuing unfair means discovers the mode of manufacturing an article, or the formula for compounding a medicine, while in the employment of the proprietor, will be enjoined for using it himself, or imparting it to others to the injury of the proprietor *Taber v. Hoffman*, 118 N. Y. 30; 16 Am. St. Rep. 740, and note.

SLATTERY v. WASON.

[151 MASSACHUSETTS, 256.]

EXECUTION — TRUST PROPERTY, WHEN NOT SUBJECT TO. — If the income of a fund is vested in A, provided that B shall be entitled to support therefrom as long as she shall remain a widow, the interest of B cannot be reached by a bill in equity and applied to the payment of her creditors. Her interest is not alienable, because if any part of her interest were given to her alienee, it would not be applied to her support.

F. Ranney, for the widow and son.

G. Wigglesworth, for the trustees.

E. R. Champlin and E. I. Baker, for the plaintiff.

W. ALLEN, J. It was decided in *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, that the donor of the income of a trust fund to one for his life might qualify the gift by a provision that the right to receive the income should not be alienable. The language of the court in *Baker v. Brown*, 146 Mass. 369, referring to that case, is applicable to the case at bar: "Such provision need not be in express terms, but it is sufficient if the intention is clearly to be gathered from the instrument, when construed in the light of the circumstances. The only question in the present case is, whether enough appears to show such intention."

The intention that the right given in the instrument under consideration should not be alienable is obvious from the nature of the gift. There is no gift of the whole income, as in *Broadway National Bank v. Adams*, 132 Mass. 170; 43 Am. Rep. 504; nor even of the whole income for the support of the beneficiary, as in *Maynard v. Cleaves*, 149 Mass. 307, and in many other cases; but, at most, a right to so much of the fund as shall be needed for her support. When the whole income or a definite sum is given to the beneficiary for his support, the whole belongs to him, and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be the expression of an intention that the right to secure it shall not be alienable; but when the right given is for a support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed. The right may be extinguished, but it cannot be aliened, because a payment to an alienee cannot be a payment for the support of the beneficiary, and no pay-

ments are required to be made by the owner of the fund except such as are for that purpose. The only escape from this conclusion is to hold that the court on this bill by a creditor will fix the amounts and times of future payments for support, and decree that they shall be fixed sums, due but not payable to the beneficiary, the right to which she can alien.

One answer to this is, that the court will not interfere to change the relations of the parties at the request of a stranger. The owner of the fund is not a trustee, and his mother is not a *cestui que trust* who, or whose representatives, can call him to account as trustee. He is the absolute owner of the fund, subject to the charge of his mother's support. He owes a duty to his mother, and she has a right against him. So long as the parties are satisfied, there is no occasion for any court to interfere with them. If he fails to perform his duty, the court, on her application, will in some way protect her rights. It may require him to give security, or it may organize a trust fund and make him or some other person trustee, and thus change the relation of the parties and the character of the fund; but the court ought to thus interfere and act only at the instance of the party in interest, and to protect her rights under the will by carrying out the intention of the testator. It will not, without her complaint and against her wishes, interfere at the suit of a third party to institute a trust, and to change the character of the fund and the relation of the parties to it, in order to defeat the intention of the testator, not only as to his daughter-in-law, but also as to his grandson. The whole fund is given to the grandson, charged only with the support of his mother. Whatever is not required for her support is his to enjoy. What is paid to her creditors is not used for her support, although it is paid by him. If the court should attempt to recoup his loss by limiting the amount which he should be liable to pay for his mother's support to the amount he is to pay to her creditors, while this would deprive her of a right of support under the will, it could not relieve him from his statutory obligation to support her. If, however, the relations of the parties, and the circumstances, were such that the court would fix and secure to Mrs. Wason the amount which should be paid to her for her support, it would take care that by so doing it did not change the condition of the property, so as to defeat, instead of carrying out, the intention of the testator. If such action was sought by Mrs. Wason to protect her rights, the decree

should be so framed as not to render the right alienable. When the parties do not desire the aid of the court, it will not interfere at the suit of a creditor to change the condition of the property, and thereby give him rights which the will alone does not give him, and which the testator did not mean that he should have. In accordance with the opinion of a majority of the court, the entry is, demurrer sustained.

EXECUTION, WHAT NOT SUBJECT TO ATTACHMENT UNDER. — As to whether trust property may be subjected to seizure and sale under execution, see *McIlwaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295, and particularly note 304-315. Compare *Beck's Estate*, 133 Pa. St. 51; 19 Am. St. Rep. 623, and note.

FIRST NATIONAL BANK OF DANVERS v. FIRST NATIONAL BANK OF SALEM.

[151 MASSACHUSETTS, 280.]

BANKS — FORGED CHECKS. — If a bank, in the ordinary course of its business, pays a check purporting to be signed by one of its depositors to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signatures of its own customers, and therefore is not entitled to the benefit of the rule which, in cases of forgery, permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which a fraud has been effected.

BANKS — FORGED CHECKS. — If a bank pays a forged check to one who took it under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the drawee, or induce him to pay the check without the usual security against fraud, it is entitled to recover of him the amount of such payment.

BANKS — FORGED CHECKS — WHO MUST BEAR LOSS OF PAYMENT OF. — Where a loss which must be borne by one of two parties alike innocent of a forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even though innocent of any intentional fraud, through whose means it has succeeded. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened, and that he was not lulled into false security by any disregard of duty on his own part, or by the failure of any precaution which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had a right to believe that he had taken.

BANKS — FORGED CHECKS. — If a bank negligently pays a forged check without inquiry as to its genuineness, or of the identity of the person presenting it, and then transmits it to the bank on which it was drawn, and is credited with the amount thereof by the latter, which retains the check for a couple of months, when it ascertains that the check, though

purporting to be drawn by one of its customers, is a forgery, it may recover the amount thereof of the bank which had so transmitted it and received credit therefor. The bank on which the check purported to be drawn had a right to believe that the bank which cashed it had, before doing so, made the usual and proper investigation regarding its validity. The negligence of the bank on which it was drawn in discovering the forgery will not prevent its recovery, where such negligence has not prejudiced the bank negligently paying the check in the first instance.

ACTION to recover money paid upon a forged check. About September 25, 1884, a check, purporting to be drawn by E. A. Mudge & Co., in favor of Joel Kimball or bearer, upon the First National Bank of Danvers, was presented to the First National Bank of Salem by a person not known to the latter bank, and without any inquiry as to the identity of the party presenting the check, and upon his signing upon the back thereof the name "Joel Kimball," the amount thereof was paid to him. The bank of Salem transmitted the check to the National Bank of Redemption for collection. On September 26, 1885, the check was received by the bank of Danvers, and by it charged to E. A. Mudge & Co., and credited to the National Bank of Redemption. Both the check and the indorsement upon it were forgeries. About two months after the check had been charged to E. A. Mudge & Co., it was shown to them for the first time, and pronounced a forgery. The failure to sooner discover the forgeries was due to the fact that the account of Mudge & Co. was not an active one, and no check had been drawn upon it later than July, 1885. The indorsement of the name of Joel Kimball on the back of the check and that name as written in the body thereof were apparently in the same handwriting. This action was by the bank of Danvers against the bank of Salem to recover the amount of the check. Judgment for plaintiff.

G. B. Ives, for the defendant.

C. T. Gallagher and H. R. Bailey, for the plaintiff.

DEVENS, J. In the case at bar the plaintiff seeks to recover from the defendant the amount of a forged check in the name of one of the plaintiff's customers, for which it had given the defendant credit as money.

In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a

forgery. It is presumed that the bank knows the signature of its own customers, and therefore is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud, or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud: *Nat. Bank of North America v. Bangs*, 106 Mass. 441, 445; 8 Am. Rep. 349. Where a loss which must be borne by one of two parties alike innocent of the forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded: *Gloucester Bank v. Salem Bank*, 17 Mass. 33. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken: *Ellis v. Ohio Ins. and Trust Co.*, 4 Ohio St. 628; *Rouéant v. San Antonio Nat. Bank*, 63 Tex. 610; *First Nat. Bank of Quincy v. Ricker*, 71 Ill. 489; 22 Am. Rep. 104.

In the case at bar it is found that the defendant was guilty of negligence in cashing the check without more inquiry as to its genuineness, and this finding is fully supported by the facts. The person who presented the check to the defendant bank was not known to either of its officers, and was not one of its customers. No attempt to have him identified was made, and without identification the money was paid over upon his indorsement on the check of the name of "Joel Kimball," the check being payable to "Joel Kimball or bearer." The nominal drawer of the check, whose name was forged, was not a customer of the defendant. It is altogether probable

that if the defendant, before it cashed the check, had made proper inquiry, the utterer of it would not have remained to encounter any such investigation, and if he had, it would readily have been ascertained that he was not the reputable person of the name of Joel Kimball who resided in Danvers. There was also evidence of the general custom of banks, in paying such checks, to have the person presenting them identified.

When this check was forwarded by the defendant for redemption, the plaintiff was without the means it would have had if it had been presented at its own counter of ascertaining the character of the person offering it. It had a right to believe that the defendant, in cashing a check purporting to be drawn by one not its own customer or entitled to draw upon it, had by the usual and proper investigation satisfied itself of its authenticity. The indorsement, which was not necessary to the transfer of the check, was a guaranty of the signature of the drawer, and the plaintiff had a right to believe that the indorser was known to the defendant by proper inquiry.

It is found that the plaintiff was negligent in not having more quickly ascertained that the check was a forgery, and in not having given notice to the defendant thereof. It is also found that in fact this negligence has not prejudiced the defendant. This negligence of the plaintiff apparently resulted from the circumstance that the account of its depositor was not what is termed an "active" account, by which we infer is intended one in which deposits and checks are frequent, and which is regularly settled at the end of each month. Even if the fact that the check when paid reduced the amount of the deposit below that which the depositor, as it was understood between him and the plaintiff, was to keep, or if any other circumstances should have called the attention of the plaintiff to the forgery, the original fault was still that of the defendant in paying the check without proper investigation. The plaintiff acted with entire promptitude when the forgery was discovered, and no negligence on its part has prejudiced the defendant. When the check was forwarded for redemption, it was entirely natural that the plaintiff should have been misled, and induced to allow the same in settlement without the scrutiny it would have exercised had not the defendant given currency thereto.

The defendant deems that the case of *Bank of St. Albans v.*

Farmers' and Mechanics' Bank, 10 Vt. 141, 33 Am. Dec. 188, resembles the case at bar in every respect, and if it is to be followed, is decisive. We do not so consider it. While in that case there was a delay on the part of the plaintiff in notifying the defendant that the check received from it was forged, the question whether there had not been negligence on the part of the defendant in originally taking the check without proper inquiry, and thus of contributing to the error into which the plaintiff fell in giving the defendant credit therefor, was not raised nor discussed. The only question of that nature there considered was, whether it was the duty of the defendant to have communicated suspicions which occurred to it after the transaction. An interpretation such as the defendant gives to this case would make it conflict with the decision in *Nat. Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 849, in which it is cited and considered. That decision strongly sustains the result which we have reached in the case at bar.

Exceptions overruled.

BANKS AND BANKING — FORGED CHECK. — As to the rights and remedies of the several parties when a forged check has been paid, see *People's Bank v. Franklin Bank*, 88 Tenn. 299; 17 Am. St. Rep. 884, and particularly extended note 889-899.

LEWIS v. JEWELL.

[151 MASSACHUSETTS, 345.]

SALE — FRAUD OF VENDOR IN MISREPRESENTING QUANTITY. — If the owner of carpets covering the floors of twelve rooms, besides the hall and stairs of a dwelling-house, knowingly and falsely represents, as of his own knowledge, that they contain a certain number of yards of material, to an intending purchaser, who, in reliance upon such representation, purchases the carpets, the vendee is liable for his misrepresentations. The purchaser was not bound to measure the carpets for himself, or to avail himself of other opportunities of ascertaining the quantity.

ACTION of tort. The plaintiff's intestate wished to buy carpets owned by the defendant, and contained in a boarding-house, where the plaintiff's intestate desired to use them. The defendant represented that there were about nine hundred yards; that there were within fifteen or twenty yards of that number. The purchase was made in reliance on this statement, and the carpets, being afterwards measured, were found to contain only 595 yards. The defendant asked the

court to rule that it was immaterial that he knowingly made a false representation, if the intending purchaser had an opportunity to measure the carpets for himself. This the court declined to do, and the jury returned a verdict for plaintiff.

O. R. Elder, for the defendant.

S. J. Thomas, for the plaintiff.

KNOWLTON, J. The carpets bought by the plaintiff's intestate covered four floors, consisting of twelve rooms, besides the hall and stairs, in a dwelling-house. The number of yards of material contained in them was an important element in determining their value, which might be the subject of a fraudulent representation. The representation of the defendant was not a mere estimate, but a statement purporting to be made as of her own knowledge; and there was evidence tending to show that it was known by her to be false. There was also evidence that the purchaser relied upon it; and if the testimony introduced by the plaintiff was true, the defendant was liable for fraud, unless the purchaser was bound to measure the carpets for himself, or to avail himself of his other opportunities of ascertaining the quantity.

Upon the evidence presented, it could not properly have been ruled, as matter of law, that the facts were so obvious or so easily discoverable that the plaintiff's intestate had no right to rely on the defendant's representations. In this commonwealth, and in other American states, in regard to representations by a vendor in a sale of land, it has been held that, in the absence of other fraud, a vendee to whom boundaries are pointed out has no right to rely on the vendor's statements as to quantity, but if he deems the quantity material, he should ascertain it for himself: *Gordon v. Parmelee*, 2 Allen, 212; *Noble v. Googins*, 99 Mass. 231, and cases cited; *Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315. We are of opinion that this rule should not be extended so as to include a case like the present, and that the instructions under which the questions were submitted to the jury were correct and sufficient.

Exceptions overruled.

SALES — FALSE REPRESENTATIONS BY VENDOR. — The quantity of chattels purchased having, by mutual mistake, been supposed to be greater than it really was, the vendee may recover the excess paid by him, or may compel the vendor to make good the deficiency: *Hargous v. Albon*, 3 Denio, 406; 45 Am. Dec. 431. As to what false representations of a vendor constitute fraud, see *Bullitt v. Farrar*, 42 Minn. 8; 18 Am. St. Rep. 485, and note.

HOLBROOK v. PAYNE.

[151 MASSACHUSETTS, 383.]

ASSIGNMENT. — AN ORDER BY A CREDITOR directing his debtor to pay a third person a certain sum of money left with the debtor, or its officers, does not amount to an assignment of any part of the debt, and the debt may therefore be thereafter attached or subjected to trustee's process, where the amount of such order is less than the amount due from the debtor to the creditor.

T. E. Grover and F. Joy, for the plaintiff.

A. S. Hall, for the claimant.

HOLMES, J. The defendant in this action has been defaulted, and the question before us is, whether the plaintiff or the claimant, Cutting, is entitled to a certain part of the debt due from the trustee to the defendant.

There is no doubt that an order for a specific fund, identified by the order itself, may be a good assignment: *Kingman v. Perkins*, 105 Mass. 111. We assume in favor of the claimant that an equitable assignment to him of a part of the debt would be good as between him and the plaintiff upon trustee process: *Dana v. Third Nat. Bank*, 13 Allen, 445, 447; 90 Am. Dec. 216; *James v. Newton*, 142 Mass. 366, 374; 56 Am. Rep. 692. Our difficulty is to discover any ground for saying that the instrument relied upon constituted such an assignment.

On its face, the order given to the claimant by the defendant does not refer to a particular fund or debt, but is an ordinary negotiable draft, or unaccepted bill of exchange, drawn upon the town on the general credit of the drawer. An indorsement of the instrument by the claimant would have given the indorsee a right of action in his own name against the drawer, if the draft should be dishonored. But the fact that the order is a negotiable instrument on its face shows that it is not drawn against a particular fund. If it were drawn against a particular fund, it would not be negotiable: *Wheeler v. Souther*, 4 Cush. 606, 607; *Harriman v. Sanborn*, 43 N. H. 128.

The case is stronger for holding a check upon a bank to be an assignment, than it is for holding an ordinary draft to be so. A check is supposed to be drawn against a fund deposited, for which, to be sure, the bank is no more than a debtor; but a debtor on the implied term that the creditor has a right to split up the debt at will, and to require part payments in such amounts, at such times, and to such persons as he chooses.

In general, the creditor has no right to draw above the amount of his deposit, and would be guilty of a fraud if he obtained money or goods for a check knowingly so drawn. Yet the weight of authority is, that a check is not an assignment either at law or in equity: *Bullard v. Randall*, 1 Gray, 605; 61 Am. Dec. 433; *Dana v. Third National Bank*, 13 Allen, 445, 447; 90 Am. Dec. 216; *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; 27 Am. Rep. 55; *First National Bank of Mount Joy v. Gish*, 72 Pa. St. 13; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Schroeder v. Central Bank of London*, 24 Week. Rep. 710. See *Laclede Bank v. Schuler*, 120 U. S. 511, 514.

A fortiori, the same rule must hold good of an ordinary draft unaccepted, which does not import the existence of a debt from the drawee to the drawer, but leaves the mode of the drawee's reimbursement to such private arrangements as may exist between the drawer and himself. And so are the decisions: *Whitney v. Eliot National Bank*, 137 Mass. 351, 355, 356; 50 Am. Rep. 316; *National Exchange Bank v. McLoon*, 73 Me. 498, 511; *Bank of Commerce v. Bogy*, 44 Mo. 13; 100 Am. Dec. 247. See *First National Bank of Canton v. Dubuque Southwestern R'y Co.*, 52 Iowa, 378; 35 Am. Rep. 280.

There is no extrinsic fact in the present case which gives the document a different effect from that which results from its tenor, if it be possible that its effect should be varied by parol: See *Whitney v. Eliot National Bank*, 137 Mass. 351, 355; 50 Am. Rep. 316; *Griffin v. Weatherby*, L. R. 3 Q. B. 758, 759; *First National Bank of Canton v. Dubuque Southwestern R'y Co.*, 52 Iowa, 378; 35 Am. Rep. 280. The defendant had done work for the town, and his only right to draw was in respect of the price of his work. If we assume this fact to have been known to all parties concerned, still it only shows that the town was known to have means of indemnifying itself if it saw fit to pay. It does not enlarge the meaning of the draft beyond that which it bears on its face, of a general request to the town to pay. Even a reference to a fund out of which a drawee may indemnify himself will not take away the negotiable character of the draft. We may remark that the concluding words of the draft in question are "charge to account of." In some of the others, they are "charge to the account of," which is slightly more specific. But we do not see any sound distinction in favor of the latter. If the town had accepted the order, having power to do so, it would have become liable on a direct and absolute contract to the claim-

ant, very likely having a right to withhold an equal amount of its debt to the defendant. But mere retention of the draft was not acceptance: *Overman v. Hoboken City Bank*, 81 N. J. L. 563.

Trustee charged. Judgment for plaintiff.

ASSIGNMENT OF PART OF A CHOSE IN ACTION. — The assignment of a part of a chose in action by a creditor, by an order drawn upon the debtor, is invalid: *Note to Harris County v. Campbell*, 2 Am. St. Rep. 472-475. But see *Harris v. Galluchat*, 28 S. C. 211; 13 Am. St. Rep. 671, and note 674, 675.

VANUXEM v. BURR.

[181 MASSACHUSETTS, 386.]

JUDGMENT, MERGER BY, ON A COLLATERAL SECURITY. — If the maker of a promissory note agrees to procure an indorser thereof, and fails to do so, and an action is brought against him upon this agreement, and a judgment recovered in which the damages are assessed at a sum equal to the amount due on the note, such judgment, remaining unsatisfied, will not preclude a recovery on the note for the amount thereof.

JUDGMENT, MERGER BY. — If a person gives two contracts, each constitutes a cause of action upon which judgment may be recovered against him, though the satisfaction of one of the judgments may operate as a satisfaction of the other.

L. D. Brandeis and W. H. Dunbar, for the plaintiffs.

J. H. Young, for the defendant.

HOLMES, J. This is an action upon a promissory note made by the defendant. The only defense is, that in another action upon a contract to procure the defendant's mother's indorsement to this note and to two others, the plaintiffs since the present suit was brought have recovered judgment against the defendant for damages assessed by agreement at a sum equal to the amount due on the three notes. If this judgment is not a bar, it is admitted that the plaintiffs are entitled to recover.

The two contracts were both in existence at the same time. They were distinct from each other in form, as appears from the statement of them. They were also distinct in substance. Supposing that the defendant could do no more to bind himself personally to pay the money to the plaintiffs than he did by making the note, still his promise to get the security of an indorser affected other things besides his personal payment or his personal obligation to pay. Its performance or breach

affected the plaintiff's power to discount the note before it was due, and the probability of their getting payment from another whom the defendant might be able to persuade to indorse, when he could not or would not induce her to pay if she had not indorsed. As the contracts were both in existence, and were different, and as they were both broken, it is plain that the plaintiffs have had two different causes of action, and there is no need to refer to the tests of difference which have been laid down in the books: *Eastman v. Cooper*, 15 Pick. 276, 286; 26 Am. Dec. 600; *Lechmere v. Fletcher*, 1 Crompt. & M. 623, 636. The question arises solely on the effect of the judgment.

What we mean when we say that a contract is legally binding is, that it imposes a liability to an action unless the promised event comes to pass, subject to whatever qualifications there may be to the absoluteness of the promise. Generally, if a man is content to make two legally binding contracts, he consents to accept the legal consequence of making two instead of one; namely, liability to a judgment upon each unless he performs it. It would be anomalous if a judgment without satisfaction upon one cause of action were held to be a bar to a suit upon another and distinct cause of action. No doubt, two contracts may be such that performance of one of them, or satisfaction of a judgment upon one of them, would prevent a recovery upon the other, either altogether or for more than nominal damages. In this commonwealth the decisions have gone somewhat further than elsewhere in treating satisfaction of one judgment as an absolute bar to another action: *Gilmore v. Carr*, 2 Mass. 171; *Savage v. Stevens*, 123 Mass. 254. But instances are too numerous and familiar to need extended mention, where the mere recovery of a judgment is held no bar to another action, although the satisfaction of it would be: *Simonds v. Center*, 6 Mass. 18; *Porter v. Ingraham*, 10 Mass. 88; *Elliott v. Hayden*, 104 Mass. 180; *Byers v. Franklin Coal Co.*, 106 Mass. 131, 136. This principle is applied not only to actions against different parties, such as the maker and indorser of a note, or joint tort-feasors, but to actions against the same individual, when he has given different obligations in respect of what is in substance the same debt. Thus judgment upon a note given by an obligor as collateral security for his bond is no bar to a subsequent action upon the bond: *Lord v. Bigelow*, 124 Mass. 185, 189; *Drake v. Mitchell*, 3 East, 251;

Lechmere v. Fletcher, 1 Crompt. & M. 623; *Fairchild v. Holly*, 10 Conn. 474; *Davis v. Anable*, 2 Hill, 339; *Burnheimer v. Hart*, 27 Iowa, 19; 99 Am. Dec. 641. See *Greenfield v. Wilson*, 13 Gray, 384; *Moore v. Loring*, 106 Mass. 455; *Miller's River National Bank v. Jefferson*, 138 Mass. 111; *Stillwell v. Bertrand*, 22 Ark. 379; *Corn Exchange Ins. Co. v. Babcock* (No. 2), 8 Abb. Pr., N. S., 256; *United States v. Cushman*, 2 Sum. 426, 440.

The principle of the cases last cited is decisive of the one at bar. No distinction favorable to the defendant can be taken between an agreement made as itself collateral security, and an agreement to furnish collateral security. If there were any difference, it would be in favor of the plaintiffs; for the collateral contracts recovered on in the cases cited were simply other contracts of the defendant to pay money, whereas the contract of this defendant was a contract to get a third person to indorse, as we have stated. It is true that in most of the cases there were other parties defendant in the first or second suit. But that circumstance had nothing to do with the ground of the decisions, as indeed it could not have had by any technical rule. The ground was that stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and approved by this court in *Lord v. Bigelow*, 124 Mass. 185, 189: "A judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." Parsons, C. J., states the law in the same way: "A judgment in a suit, where the action is given as a remedy merely cumulative, is no bar, unless such judgment has been satisfied; for although there may be two remedies, there can be but one satisfaction": *Storer v. Storer*, 6 Mass. 390, 393.

The technical effect of the judgment as a bar would be the same, whether the defendant in both suits were the same, or other defendants were joined in any one of them. The rule as stated by the courts in all the cases applies with equal force, whichever may be the fact. If we were to depart from that rule, and to say that a man should have but one judgment, although he had different causes of action, when we thought he could get from a single judgment all the satisfaction he was likely to get, we should be legislating, instead of follow-

ing the precedents, and legislating in very doubtful accord with the contracts of the parties.

Exceptions sustained.

JUDGMENTS—MERGER.—As to when a cause of action is merged in a judgment, and when not, see note to *Speed v. Haws*, 15 Am. Dec. 81-83.

FREEMAN'S NATIONAL BANK v. NATIONAL TUBE WORKS COMPANY.

[151 MASSACHUSETTS, 412.]

INDORSEMENT OF DRAFT FOR THE PURPOSE OF COLLECTION ON ACCOUNT OF ITS OWNER passes the legal title so far only as to enable the indorsee to demand, receive, and sue for the money to be paid. The owner may still control the paper, unless paid, and may intercept the proceeds of it in the hands of the intermediate agent.

INDORSEMENT OF A DRAFT BY BANK A TO BE PAID TO BANK B FOR ACCOUNT OF BANK A, and its indorsement by bank B that it is to be paid to bank F for account of bank B, do not imply that the draft is the property of bank B, but merely that it is to be paid to bank B as agent of bank A. An unbroken succession of such indorsements would indicate that each indorser was acting by direction of the next preceding indorser, who was himself the agent of the original owner, for whom the collection was to be made; and when it is made to the last indorsee, he has no right to apply it as having been the property of the last indorser, and if it remains uncollected to advance him moneys on account of it, and to enforce its collection as against the equitable owner to reimburse himself for such advances.

ACTION of contract upon one draft for twenty thousand dollars, the other for nine thousand nine hundred dollars, and for seven thousand dollars alleged to be paid for defendant's use. The first and second drafts were identical, except as to the amounts thereof, and the first draft and the indorsements thereon were as follows:—

"20,000.

McKEESPORT, PA., May 17, 1884.

"At sight, for value received, pay to the order of A. Chaudon twenty thousand dollars, and charge this office as per margin.

"NATIONAL TUBE WORKS Co.,

By E. C. CONVERSE, Asst. Mgr., for President.

"To WM. S. EATON, Treas., 8 Pemberton Square, Boston, Mass."

Across the face of each draft was the following: "May 19-84. Accepted, E. R. Hall, Asst. Treas."

The drafts bore the following indorsements successively:—

"Pay to the order of C. R. Stuckslager, Cashier. A. Chaudon."

"Pay Penn Bank, or order, for account of People's Bank, McKeesport, Pa. C. R. Stuckslager, Cashier. T. D. Gardner, As. Cash."

"Pay Freeman's National Bank, Boston, or order, for account of Penn Bank, Pittsburgh, Pa. C. L. Reiber, Cashier."

When the drafts sued upon were drawn, Edward C. Converse was the assistant general manager of the defendant at McKeesport, Pennsylvania, and A. Chaudon was a clerk in its employ. The drafts were drawn without any consideration and were deposited in the People's Bank of McKeesport, of which C. R. Stuckslager was cashier, in which bank the defendant had an account by its officers on its behalf. The drafts were at once sent by the People's Bank to its correspondent, the Penn Bank of Pittsburgh, indorsed as shown above, accompanied by a letter stating "We indorse for collection and credit." The People's Bank did not pay the drafts, nor make any advances or give any credit thereon, or make any entry of them in its books, though it acknowledged their receipt in a letter of which it kept a pressed copy, saying that such drafts were entered for collection, "to be used when paid." The drafts were not charged to the Penn Bank by the People's Bank, nor did the latter draw anything on account thereof. They were, however, entered on the books of the Penn Bank to the credit of the People's Bank, and to the debit of the plaintiff bank, in the mode in which it entered all cash items in its current account with those banks, but nothing was paid thereon. On the same day, May 17th, the Penn Bank sent the drafts to the plaintiff, which was its correspondent at Boston, accompanied by a letter stating that the drafts were inclosed for collection, and on the same day drew a check on the plaintiff bank to the order of the American Exchange Bank for seven thousand dollars and credited the amount to the plaintiff. The plaintiff received the drafts on May 19th, and they were accepted by the defendant on the same day. The day afterwards, the check of the Penn Bank for seven thousand dollars reached the plaintiff and was paid by it. At the close of business on May 19th, there was upon the books of the plaintiff bank a balance to the credit of the Penn Bank of \$1,238.95, while at the close of business on May 20th, the balance to the debit of the Penn Bank was \$6,063.76. The plaintiff entered the drafts upon its collection-book, but

not upon its account current, nor upon any other book or account, to the credit of the Penn Bank. The latter, on the 21st or 22d of May, failed, and the defendant's treasurer was notified by the People's Bank and by the manager of the defendant not to pay the drafts. Payment was thereupon refused. The object of drawing the drafts was to procure funds from Boston to pay the expenses of the defendant at its mills at McKeesport, and every month drafts were drawn in similar form and for similar purpose, generally exceeding one hundred thousand dollars, and were indorsed in precisely the same way and passed through the same banks. Neither of the drafts was collected by the plaintiff, but it brought action thereon against the defendant, by which they had been accepted.

W. G. Russell and J. Fox, for the plaintiff.

E. W. Hutchins and H. Wheeler, for the defendant.

KNOWLTON, J. The indorsement from the defendant to the People's Bank, although in terms unrestricted, was without consideration, and merely for the purpose of collection. The People's Bank became the agent of the defendant, and the defendant, as owner of the drafts, can avail itself of all that its agent did for its protection.

The subsequent indorsements through which the drafts came to the plaintiff were both restrictive, giving notice that the ownership had not passed beyond the People's Bank. They purported to be made only for the purpose of collection on account of the owner, and they merely passed the legal title so far as to enable the indorsee to demand, receive, and sue for the money to be paid: *Lynn National Bank v. Smith*, 132 Mass. 227. It is well settled that upon such an indorsement the owner may control his negotiable paper until it is paid, and may intercept the proceeds of it in the hands of an intermediate agent: *Manufacturers' National Bank v. Continental Bank*, 148 Mass. 553; 12 Am. St. Rep. 598, and cases there cited. The indorsement of the Penn Bank, taken in connection with the former indorsement of the People's Bank, did not, by the words "for account of Penn Bank," imply that the Penn Bank was the owner. It was a request to pay "for account of" the Penn Bank as agent of the People's Bank. An unbroken succession of such indorsements would indicate that each indorser was acting by direction of the next preceding indorser, who was himself an agent of the owner, who had before indorsed, and for whom the collection was to be made.

Nothing was shown in the course of business of either of the banks necessarily to conflict with the implication to be derived from the form of the indorsements. The letter of the People's Bank in which the drafts were sent to the Penn Bank was, simply, "We inclose for collection and credit" the drafts, describing them. The Penn Bank, in its reply, said, "We enter for collection" the drafts described, "to be used when paid." As recited in the report, "the drafts, when received by the Freeman's Bank, were entered upon its collection-book, but have never been entered upon its account current, or upon any other book or account, to the credit of the Penn Bank." It has so long been held by the courts that an indorsement of this kind is restrictive, protecting the rights of the owner, that officers of banks must be presumed to have well understood the law, and when they have honored overdrafts drawn by other banks which had sent other drafts for collection, must have done it trusting in part to the financial soundness of their correspondent, and in part to the probability that the drafts would be paid, and not to a supposed legal right to control the drafts against the owner: *Rice v. Stearns*, 3 Mass. 225, 227; 3 Am. Dec. 129; *Wilson v. Holmes*, 5 Mass. 543; 4 Am. Dec. 75; *Treuttel v. Barandon*, 8 Taunt. 100; *Sigourney v. Lloyd*, 8 Barn. & C. 622; *Leary v. Blanchard*, 48 Me. 269; *Sweeny v. Easter*, 1 Wall. 166; *Bank of Washington v. Triplett*, 1 Pet. 25; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Bank of Metropolis v. New England Bank*, 1 How. 234; 6 How. 212.

One who collects commercial paper through the agency of banks must be held impliedly to contract that the business may be done according to their well-known usages, so far as to permit the money collected to be mingled with funds of the collecting bank: *Dorchester and Milton Bank v. New England Bank*, 1 Cush. 177. When a payment is made to his agent and the money is put with the money of the collecting bank, he has a right to receive a corresponding sum, but he loses his right to the specific fund. In the absence of directions to the contrary, the collecting bank may pay it to the bank to which it should regularly be remitted by setting it off against a debt due from that bank and giving credit for it in the account.

Very likely, authority to collect would authorize the receipt of the money from the payor before maturity, if he saw fit then to pay, and remittances afterwards made, whether by a payment of money or by a set-off and adjustment of accounts in

the usual way, would be good against the owner. In the present case no collection was made, for payment was stopped before the draft became due. The plaintiff had no right to advance the Penn Bank seven thousand dollars, or any other sum, on account of the defendant. Its only authority was to transmit, or pay by adjustment and set-off, money which it received for the defendant.

We are of opinion that upon the facts reported the action cannot be maintained.

Judgment for the defendant.

NEGOTIABLE INSTRUMENTS — INDORSEMENT FOR COLLECTION. — The indorsement for collection of a draft or check is not a transfer of the title, but merely constitutes the indorsee the agent of the indorser to present the paper, demand and receive payment, and remit the proceeds: *National B. & D. Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515, and note.

CURRAN v. CITY OF BOSTON.

[151 MASSACHUSETTS, 505.]

MUNICIPAL CORPORATIONS ARE NOT LIABLE TO PRIVATE ACTIONS FOR OMISSION OR NEGLIGENCE in the performance of a corporate duty imposed upon them by law, or for that of their servants employed therein, when such corporations derive no benefit therefrom in their corporate capacity, unless such action is given by statute.

MUNICIPAL CORPORATION MAINTAINING A WORKHOUSE, when authorized though not required to do so by an act of the legislature, does not become answerable for the negligence of its officers or servants on the ground that it has voluntarily assumed the duty of maintaining such workhouse. It is performing a strictly public duty, which cannot be of any advantage to it.

MUNICIPAL CORPORATION CANNOT BE HELD ANSWERABLE for the negligence of its officers and servants in charge of an inmate of a workhouse, when its government is by law placed in the hands of a board of directors of public institutions, which, though elected by the city council, is an independent body, and not in any sense the agent or servant of the city.

MUNICIPAL CORPORATION CANNOT BE HELD ANSWERABLE FOR THE NEGLIGENCE OR OMISSIONS of its officers or servants in charge of a workhouse on the ground that its inmates are required to be kept at work, and some revenue is derived from their labor, if the institution is not conducted with a view to pecuniary profit.

E. Greenwood, for the plaintiff.

R. W. Nason, for the defendant.

DEVENS, J. The plaintiff was an inmate of the workhouse, or house of industry, belonging to the city of Boston, situated

on Deer Island, having been convicted of the misdemeanor of not supporting his family, and having been legally sentenced to confinement there. He was injured while engaged in unloading coal, and it must be assumed was prepared to prove that he himself was in the exercise of due care, and that the officers and servants employed in this institution were negligent. The single question presented is, whether these officers and servants—engaged in conducting the work incident to the maintenance of the workhouse of the city, and to the employment of the inmates thereof, from whose employment it derives a certain amount of revenue, such officers and servants being also engaged in the management of the city's property employed in the business of the workhouse—are agents of the city, for whose negligence in the performance of their duties it is responsible.

It is a general principle that municipal corporations are not liable to private actions for omissions or neglect in the performance of a corporate duty imposed upon them by law, or for that of their servants engaged therein, when such corporations derive no benefit therefrom in their corporate capacity, unless such action is given by statute: *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485, and cases cited. The contention of the plaintiff is, that the case at bar is distinguishable, because, as a mere volunteer, the city has devoted property, intended mainly for corporate purposes, to other purposes, for its own advantage, as in *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; that it has voluntarily undertaken a work partially for the public good, with a view to this, and to relieve itself from burdens peculiar to itself; and that it has embarked in an enterprise partly commercial, from which it receives a partial remuneration for its expenditures out of a special class in the community, so that the entire expense of conducting the workhouse is not met by taxation. While the workhouse is maintained primarily by the city at its own expense, it was not by law compelled to establish this institution. The plaintiff's argument concedes that, when established, its officers and servants were selected by the board of directors of public institutions, not by the city; but it urges that they are still to be deemed the agents of the city, as the act of establishing such an institution is voluntary, and the imposition of the ministerial duties upon such officers is the act of the municipality, and that therefore it is immaterial whether the ministerial duties involved in the administration

of such an institution are cast by statute upon a board over whose tenure of office the city has no control.

The authority to erect and maintain a workhouse, or almshouse, to relieve therein poor and indigent persons, is given by the Public Statutes, c. 83, sec. 1 (Gen. Stats., c. 22, sec. 1). The same section provides that offenders of the class to which the plaintiff belonged are to be there maintained, when sentenced thereto by proper authority. The Public Statutes, c. 207, sec. 29, provide that such offenders may be sentenced "for a term not exceeding six months to the house of correction, or to the house of industry or workhouse within the city or town where the conviction is had, or to the workhouse, if any there is, in the city or town in which the offender has a legal settlement, if such town is within the county." There is no imperative direction that the city shall establish a workhouse, but by law it is responsible for all the county charges of Suffolk County, and if the convict were sentenced to confinement therein, his expenses would necessarily be paid by it: Pub. Stats., c. 22, sec. 6. By the more general law, any city or town which has in the house of correction an inmate having his settlement in such town is liable for the cost of his support: Pub. Stats., c. 220, sec. 61. By the statute authorizing the erection and maintenance of workhouses by a city, a mode of performing a strictly public duty is provided for, which cannot be of any pecuniary advantage to the cities or towns instituting them. No such case is presented as exists where a city has undertaken to build particular works, as water-works, sewers, etc., and where a city acts as an agency to carry on an enterprise to some extent commercial in its character, for the purpose of furnishing conveniences and benefits to such as choose to pay for them. The element of consideration then comes in, and in such cases it is usually held that a liability exists on the part of the city for an injury to an individual through negligence in building or maintaining such works: *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Murphy v. Lowell*, 124 Mass. 564; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289.

The action of the city in establishing the workhouse was purely for the public service, and for the general good in providing for the care and support of offenders for whose maintenance it was responsible. While in some cases the statute

enjoins and directs action similar to this, and in others permits it, as there is in either case no element of corporate advantage or of pecuniary profit to the city, it is not to be held responsible because it exercised the option which was given to it to undertake what it did: *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196. In *Tindley v. Salem*, 187 Mass. 171, 50 Am. Rep. 289, the cases in regard to the liability of towns for the acts of servants or agents were carefully collected and considered by Mr. Justice Charles Allen. Referring to the distinction attempted to be drawn between negligence of the servants of a town or city in the performance of a duty imperatively required, and one voluntarily assumed by authority of the statute, he remarks: "This distinction does not affect the resulting liability. There are many provisions of statute, by which all municipal corporations must do certain things, and may do certain other things, in each instance with a view solely to the general good. In looking at these provisions in detail, it is impossible to suppose that the legislature have intended to make this distinction a material one in determining the question of corporate liability to private actions. For example, towns must maintain pounds, guide-posts, and burial-grounds; and may establish and maintain hospitals, workhouses, or almshouses. . . . In all of these cases the duty is imposed or the authority conferred for the general benefit. The motive and the object are the same, though in some instances the legislature determines finally the necessity or expediency, and in others it leaves the necessity or expediency to be determined by the towns themselves. But when determined, and when the service has been entered upon, there is no good reason why a liability to a private action should be imposed when a town voluntarily enters upon such a beneficial work, and withheld when it performs the service under the requirement of an imperative law." We are of opinion, therefore, that the city cannot be held liable upon the ground that the workhouse was established by it voluntarily.

Upon another ground, also, the city cannot be held liable for the alleged negligence of the officers and servants engaged with the plaintiff in the work in the performance of which he was injured. When the city established the workhouse, the inspection, ordering, and government thereof were placed by law in the hands of "the board of directors for public institutions" for the county of Suffolk. This is a board of public

officers whom the city council of Boston are required to elect by concurrent vote. While certain powers are given to this board by statute, and certain ordinances may be passed by the city council not inconsistent with the statute, as to the performance of its duties, it is an independent body, in whom is vested the administration of the public institutions. It is not an agent of the city, nor does it perform any duties as such: Stats. 1857, c. 35. As the board is not in any proper sense the agent or servant of the city, those whom it employs cannot be so considered.

Nor do we perceive any reason why the city should be held responsible because some revenue is derived from the labor of the inmates. It is required by the statute that these inmates should be kept at work, but the institution is not conducted with a view to pecuniary profit. It is not suggested that the expenses of maintaining the workhouse are met by what is derived from the labor of the inmates, or that any profit above them is made. Even if the entire expense is not met by taxation by reason of the profit thus derived, such profit is purely incidental. The object and purpose of the workhouse and the conduct of it are not thus shown to be of the nature of a business. It only appears that as a public institution it is managed in a judicious and economical manner.

It was therefore correctly ruled that the plaintiff could not maintain his action against the city, and that his remedy, if any, was against the officers and servants alleged to be guilty of the negligence by which he claimed to have been injured.

Exceptions overruled.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE TO PERFORM DUTY. — Municipal corporations are not usually liable in damages for the neglect of their officers, servants, or agents, unless made so by statute: *O'Leary v. Board of etc. Commissioners*, 79 Mich. 281; 19 Am. St. Rep. 169, and note. The liability of a city or town for negligence of its officers or agents depends upon whether it is exercising governmental duties, or powers and privileges conferred for its own benefit: *Moffitt v. City of Ashville*, 103 N. C. 237; 14 Am. St. Rep. 810, and note; *Edgerly v. Concord*, 62 N. H. 8; 13 Am. St. Rep. 533, and note. The statutory liability of a municipality depends upon the true interpretation of the statute creating it: *Dundas v. City of Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457, and note.

BARNES v. LYNCH.

[151 MASSACHUSETTS, 510.]

CO-TENANCY. — CONVEYANCE OF A PORTION OF THE COMMON LANDS by metes and bounds, even when they are composed of separate parcels, may be treated as void by the other co-tenants.

PARTITION OF A PART OF THE COMMON LANDS, ALL OF WHICH ARE SITUATE IN THE SAME COUNTY, cannot be enforced except by the consent of all the co-tenants; and though one parcel of such land may have been conveyed by one of the co-tenants purporting to convey it in severalty, his grantee is entitled to insist that no partition be made except of all the lands of the co-tenancy. Such partition is of advantage to him, because it may result in the setting off to his grantor of the part so conveyed in severalty, and the operation of the conveyance, by way of estoppel, so as to give a perfect title to the grantee.

PARTITION MAY BE MADE SO AS TO PROTECT those who may be benefited incidentally, as, for instance, grantees in severalty of some of the co-tenants, where they can be protected without prejudicing the rights of other tenants in common.

SEPARATE SUITS OF PARTITION OF FOUR SEPARATE PARCELS OF LAND SITUATE IN THE SAME COUNTY will not be allowed, though one of the co-tenants, claiming to own the land in severalty, has conveyed three different parcels of it to as many different persons.

B. B. Jones, for the petitioners.

C. U. Bell and J. R. Poor, for the respondent Lynch.

DEVENS, J. Benjamin G. Boardman, Sen., died seised of four distinct parcels of land in Lawrence, which descended to his four children. Soon after his death, Benjamin G. Boardman, Jr., one of his sons, erroneously claiming title in severalty to all these parcels, conveyed three of them to different persons. The title thus claimed by Benjamin G. Boardman, Jr., was founded upon a purchase of these four parcels at a tax sale, which sale has been declared void by a recent decision of this court: *Barnes v. Boardman*, 149 Mass. 106. The grantee of one of the parcels thus conveyed by Benjamin G. Boardman, Jr., one Harrigan, conveyed the same to the respondent Lynch, who purchased it in good faith. The petitioners, in their petition for partition in the case at bar, are the children and heirs of Charles W., one of the sons of Benjamin G. Boardman, Sen., who have brought separate petitions for the partition of these four separate parcels. The respondents in this petition are Lynch, who claims under one of the deeds from Benjamin G. Boardman, Jr., and the heirs or devisees of the two other children of Benjamin G. Boardman, Sen. None of the respondents object to the partition of the parcel in question except Lynch, and the questions pre-

sented are, whether he can object that partition of all the four parcels of the land which descended to the children of Benjamin G. Boardman, Sen., as tenants in common, is not sought in this proceeding, and whether this petition can be maintained against him for partition of this single parcel. The deed from Benjamin G. Boardman, Jr., under which Lynch claims, purported to convey the whole of the parcel described therein, and the contention of the petitioners is, in substance, that they may, without recognizing its full validity as an operative conveyance, recognize it to the limited extent of conveying the interest of Benjamin G. Boardman, Jr., in the parcel therein described, and that Lynch may thus be treated as their co-tenant in this parcel only.

That a deed of a portion of the common land by metes and bounds, even where it is composed of separate parcels, may be treated as void by the other co-tenants, is well settled. Nor can a tenant in common enforce partition of a part of the common land situate in the same county, except by consent of all the co-tenants: *Bartlet v. Harlow*, 12 Mass. 348; 7 Am. Dec. 76; *Varnum v. Abbot*, 12 Mass. 474; 7 Am. Dec. 87; *Miller v. Miller*, 18 Pick. 237; *Blossom v. Brightman*, 21 Pick. 283, 284; *Marks v. Sewall*, 120 Mass. 174, 177. The co-tenants must either treat the deed of the separate parcel to Lynch as good, or must avoid it. If it is treated by them as good, then Lynch is entitled to the parcel it undertakes to convey. If they avoid it, they have no further concern with Lynch, but must proceed against Benjamin G. Boardman, Jr., for a division of the whole common land. They cannot treat the deed as good to the extent of conveying the interest of Benjamin G. Boardman, Jr., in the specified parcel, and thus make Lynch their co-tenant in the distinct portion of the common land. Benjamin G. Boardman, Jr., had no more right to convey his interest in such a parcel than the parcel itself, nor did he undertake to do so.

If, as the result of a partition between the other co-tenants and Benjamin G. Boardman, Jr., the lot of land conveyed to Lynch shall be assigned to Benjamin G. Boardman, Jr., then the conveyance made by him might operate by way of estoppel against him: *Varnum v. Abbot*, 12 Mass. 474; 7 Am. Dec. 87. Whether such a partition will be made is indeed uncertain, but Lynch is entitled to the chance that it may be made, and that thus he may be invested with a title.

The petitioners have brought a separate petition for parti-

tion of the lot unconveyed by Benjamin G. Boardman, Jr., and separate petitions for partition of each of three several lots conveyed by him. It may be that the four lots are of equal value; if so, it is not just that the other co-tenants should be allowed to prevent Lynch or the other individual grantees from having the interest of Benjamin G. Boardman, Jr., in the unconveyed parcel considered in the division; nor should it in this way be retained for him. Yet such would be the probable effect of the course proposed. It may be that the lots are of very unequal value, and that the unconveyed parcel is worth much more than the parcels conveyed, perhaps three or four times as much. If so, a partition might be made which would assign to Benjamin G. Boardman, Jr., the three parcels which he has conveyed separately. It is not an answer to say that in a petition for partition of the whole estate held by the tenants in common the respondent Lynch could not be heard. The conveyances made by Benjamin G. Boardman, Jr., were made erroneously, by reason of a supposed title distinct from that of the tenants in common. It is to be presumed that he will desire to see justice done his grantees as far as possible in the division, and certainly that he will not seek to hold on to the share of the fourth parcel which his co-tenants would leave him, as against the conveyances made by him. While partition is to be made with reference to the rights of co-tenants, there is no reason why, these being fully regarded, it should not be made so as to protect those who may be protected and benefited incidentally: Freeman on Co-tenancy and Partition, sec. 205. When an estate in common consists of several parcels, it is not necessary that there should be assigned to each co-tenant a share in each parcel: *Hager v. Wiswall*, 10 Pick. 152. It is possible, certainly, that in the partition so made Lynch will not receive as much as the petitioners propose to allot to him, or that if a separate parcel is assigned to Benjamin G. Boardman, Jr., in the partition, it will be one other than that in which Lynch is interested. This is a matter which he must consider. He has a legal right that the tenants in common shall recognize the deed as valid which purported to convey to him by metes and bounds a parcel of the common estate, or that they should treat it as invalid, and deal only with his grantor, leaving to Lynch such remedies as he may have.

In *Bigelow v. Littlefield*, 52 Me. 24, 83 Am. Dec. 484, the precise question here discussed was passed upon, and it was

there held that where partition of real estate is to be enforced by legal process the partition of the whole tract held in common must be petitioned for at the same time; that one tenant in common could not enforce partition of a part only of the common estate; and that a conveyance by a tenant in common of a part only of the land thus held would not authorize a co-tenant to enforce partition of such part against the grantee, leaving the rest of the estate unpartitioned. In that case a husband and wife were co-tenants; the husband conveyed to one Hilton (who afterwards conveyed a portion thereof to one Littlefield) a certain tract of the common estate by metes and bounds, for a full consideration, and the wife then petitioned for a partition of the tract thus conveyed. It is there said that if the petitioner had asked to have the whole estate partitioned, the title of the respondents could have been protected by setting off to the husband the part of the land held by them, leaving to the wife the remainder; or if the land conveyed to the respondents was more than the husband's portion, the title of the respondents could be protected to the extent of the husband's interest in the whole tract. This case does not differ in principle from that at bar; indeed, if Lynch were the only grantee, it would be precisely parallel. While in the case at bar, taken in connection with the other cases, there is more than one grantee and one tract of land, and while there may be less chance that all will be protected, and some may and some may not be, the grantees have the right that the whole share of Benjamin G. Boardman, Jr., in the common estate, be considered in any partition, and that they should not be required to limit themselves to his proportion of the three tracts which he assumed to convey in severalty. The co-tenants should not be permitted to divide the common estate into parcels, and then seek partition of some of these parcels only.

It is a minor matter, but not unworthy of notice, that the proceedings initiated by the co-tenants require four distinct suits, with their attendant costs and expenses, whereas if one had been brought without reference to the deeds to Lynch and others, the whole matter would have been settled by a single petition. For the reasons stated, a majority of the court are of opinion that the entry should be, petition dismissed.

CO-TENANCY — CONVEYANCES BY ONE TENANT IN COMMON. — A tenant in common may convey his own interest in one of several tracts or parcels of

land held in common by several persons: *Shepherd v. Jernigan*, 51 Ark. 275; 14 Am. St. Rep. 50, and note; *Peterson v. Fowler*, 73 Tex. 524. But one tenant in common cannot, as against his co-tenants, convey part of the common property in severalty by metes and bounds, or even an undivided share of such part: *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 163, and note 171, 172; *Ballou v. Hale*, 47 N. H. 247; 93 Am. Dec. 438. Such a conveyance is absolutely void: *Duncan v. Sylvester*, 24 Me. 482; 41 Am. Dec. 400.

PARTITION — WHAT PREMISES MAY BE PARTITIONED. — A tenant in common cannot enforce partition of a part only of the common estate: *Bigelow v. Littlefield*, 52 Me. 24; 83 Am. Dec. 484, and note 485, 486; *Freeman on Cotenancy and Partition*, sec. 508.

MORASSE v. BROCHU.

[51 MASSACHUSETTS, 567.]

SLANDER — PLEADING. — THE NAMES OF PERSONS WHO HAVE CHANGED TO EMPLOY PLAINTIFF need not, it has been held, be stated in a complaint in an action to recover special damages for slander, whereby plaintiff was injured in his trade or profession. The rule upon this subject in Massachusetts discussed, but not decided.

SLANDER. — WORDS NOT DEFAMATORY WILL SUPPORT AN ACTION FOR SLANDER, if they are falsely and deliberately uttered to work injury, and accomplish their intended purpose.

SLANDER. — WORDS ARE ACTIONABLE PER SE which convey an imputation upon one in the way of his profession or occupation, and in such case there need be no averment of special damages.

SLANDER. — A PRIEST IS LIABLE TO AN ACTION FOR SLANDER, if, referring to a physician who has contracted a second marriage before the death of his divorced wife, he informs his congregation, in effect, that the fact of such marriage is to excommunicate the person referred to, and that if any of them should be sick, and in want of the priest's assistance, they need not send for him if such physician was there, because he, the priest, would not be in the same room with him. These words were a virtual instruction that the person referred to was an unsuitable and improper person to be employed as a physician, and a direction not to employ him, on pain of losing caste in the church and the ministrations of its priest.

SLANDER — EVIDENCE IN AGGRAVATION OF DAMAGES. — Where a physician has sued a priest for slander, it is proper to prove, in aggravation of damages, that after the action was brought the defendant referred to it in the presence of his congregation, and said, "We shall see if the church shall destroy the vermin or the vermin the church."

J. Hopkins, for the defendant.

W. S. B. Hopkins and A. J. Bartholomew, for the plaintiff.

C. ALLEN, J. 1. The defendant contends that there is no sufficient averment of special damages. The averment in respect to the plaintiff's loss of practice as a physician is,

that members of the church, and other persons, have refused to have transactions with him, or to employ him in his profession, whereby he has been deprived of the profits, income, and emoluments thereof. The only omission of any needful averment which is suggested is, that the names of the persons who have ceased or refused to employ the plaintiff should have been set out.

Where there is merely an accusation of immorality, in words which might be spoken of any one, whether having any particular occupation or not, it has often been held that a charge of special damages, from loss of custom or society must include the names of those who have cut off from the plaintiff in consequence of the imputation. This rule has not been so strictly held in cases where the accusation has been made for the express purpose of injuring the plaintiff in his trade or profession, and has had that effect; and in various cases, and for differing reasons, the rule in such cases has been relaxed, and a general averment of loss of customers has been held sufficient: *Evans v. Harries*, 1 Hurl. & N. 251; *Riding v. Smith*, 1 Ex. D. 91; *Clarke v. Morgan*, 38 L. T., N. S., 354; *Hopwood v. Thorn*, 8 Com. B. 293, 308, 309, per V. Williams, J., interloc.; *Weiss v. Whittemore*, 28 Mich. 366; *Trenton Ins. Co. v. Perrine*, 23 N. J. L. 402, 415; 57 Am. Dec. 400. See also *Hargrave v. Le Breton*, 4 Burr. 2422; *Hartley v. Her-ring*, 8 Term Rep. 130.

In this commonwealth this question has not been decided. In *Cook v. Cook*, 100 Mass. 194, the charge was general, and had no relation to any particular occupation of the plaintiff, and there was no question of loss of custom or of society. In *Fitzgerald v. Robinson*, 112 Mass. 371, the averments were full, and no question arose.

In the present case there was a demurrer to the declaration. The practice act requires that in case of a demurrer the particulars in which the alleged defect consists shall be specially pointed out: Pub. Stats., c. 167, sec. 12. In view of this requirement, the defendant specially, and at length, assigned five different grounds of demurrer, but there was no intimation of an objection on the ground that the names of the persons who would not employ the plaintiff were omitted. If the demurrer had contained this ground of objection, the plaintiff might have applied for leave to amend. Moreover, the practice act provides that no averment need be made

which the law does not require to be proved, and that the substantial facts may be stated without unnecessary verbiage: Pub. Stats., c. 167, sec. 2; and the court may in all cases order either party to file a statement of such particulars as may be necessary to give the other party and the court reasonable knowledge of the nature and grounds of the action or defense: Pub. Stats., c. 167, sec. 61. The demurrer having been overruled, no motion was made by the defendant for an order that the plaintiff be required to specify the names of persons referred to in the declaration. So far as the matter of pleading, therefore, is concerned, it must be considered that the defendant was content to go to trial without an averment of the names of these persons; and his request, at the close of the evidence, for an instruction to the jury that there was no sufficient allegation of special damage to make the words actionable, came too late, even if otherwise it could be considered as the proper way to raise the objection.

It must now be taken, therefore, that there was a sufficient averment of special damages.

2. If there was a sufficient averment of special damages, then the question is, whether an imputation of the kind made by the defendant upon the plaintiff, when false, and when made for the express purpose of injuring the plaintiff in his profession, and when such injury is the probable and natural result of the speaking of the words, and when such injury actually follows, just as was intended by the defendant, will support an action by the plaintiff against the defendant.

It is sometimes said that it will not, unless the words are defamatory. But the better rule is, that such an imputation, whether defamatory of the plaintiff or not, will support an action under the circumstances above mentioned. There are all the elements of a wrongful act deliberately done for the purpose of working an injury, and actually working one, even though the words have no meaning which, strictly speaking, could be called defamatory: *Riding v. Smith*, 1 Ex. D. 91; *Lynch v. Knight*, 9 H. L. Cas. 577, 600, per Lord Wensleydale; *Barley v. Walford*, 9 Q. B. 197; *Green v. Button*, 2 Crompt. M. & R. 707; *Trenton Ins. Co. v. Perrine*, 23 N. J. L. 402; 57 Am. Dec. 400. See also Odgers on Libel and Slander, 89, and at bottom of page 91, where the question is fully discussed. It may not be technically an action for slander, if the words are not defamatory; but the name of the action is of no consequence.

In *Kelly v. Partington*, 5 Barn. & Ad. 645, 648, Littledale, J., suggested the following illustration: "Suppose a man had a relation of a penurious disposition, and a third person, knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money. Would that be actionable?" And Sir John Campbell answers: "If the words were spoken falsely, with intent to injure, they would be actionable." In *Odgers on Libel and Slander*, 90, the following illustration is given: "If in a small country town, where political or religious feeling runs very high, I maliciously disseminate a report, false to my knowledge, that a certain tradesman is a radical or a dissenter, knowing that the result will be to drive away his customers, and intending and desiring that result; then, if such result follows, surely I am liable for damages in an action on the case, if not in an action of slander." In such a case there is an intentional causing of temporal loss or damage to another, without justifiable cause, and with the malicious purpose to inflict it, which will sustain an action of tort: *Walker v. Cronin*, 107 Mass. 555. And under this doctrine, in the opinion of a majority of the court, the present action may well stand.

3. But even if the averment of special damages is to be regarded as insufficient for want of naming the persons who would not employ the plaintiff as a physician, the question remains, whether the words are actionable *per se*, as containing a defamatory imputation upon the plaintiff; or, rather, whether there was enough in them to warrant the judge in submitting them to the jury.

Words are held to be actionable *per se* which convey an imputation upon one in the way of his profession or occupation, and in such case there need be no averment of special damages. The old phraseology of Comyn's Digest, which has often been followed or repeated, is, that "words not actionable in themselves are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office": Com. Dig., Action on the Case for Defamation, D, 27; and many cases turn upon the question whether words spoken of one who has a particular profession or trade touch him in it; that is, whether they have such a close reference to such profession or trade that it can be said that they are defamatory by means of an imputation upon him in that character, as,

e. g., an imputation upon him as a clergyman, a physician, or a tradesman, distinctly from and independently of being an imputation upon him as an individual. Some of the cases have gone very far to negative such a construction. Thus, for example, it was said by Bayley, B., in *Lumby v. Allday*, 1 Crompt. & J. 301, that it was his opinion (for the time being) that the words must go to the length "of showing the want of some necessary qualification, or some misconduct in the office." And in *Ayre v. Craven*, 2 Ad. & E. 2, words imputing adultery to a physician were held not actionable *per se*, and without special damage, there being nothing to show that the adultery was committed by him while acting as a physician, or in connection with his medical practice. These two cases are perhaps the most striking of any in that direction. But see also *Pemberton v. Colle*, 10 Q. B. 461, and *Gallwey v. Marshall*, 9 Ex. 294, for instances where imputations upon clergymen were held not to reflect upon them in their profession. The case of *Ayre v. Craven*, has not escaped criticism and comment, both from the bar and the bench, though perhaps it has never been overruled. In *Hopwood v. Thorn*, 8 Com. B. 293, Cockburn and E. James said in argument: "*Ayre v. Craven* has confessedly gone to the very verge of absurdity." In *Gallwey v. Marshall*, 9 Ex. 294, Willes said, in argument, "The case of *Ayre v. Craven* is an extreme case"; to which Alderson, B., replied from the bench: "There are certain professions the proper exercise of which depends on morality; and except for the case of *Ayre v. Craven*, I should have thought that that of a physician was one of them": Page 297. It may well be suggested that the doctrine of that and kindred cases has a distinct tendency to lower the estimation in which clergymen and physicians are naturally and properly held. At any rate, they do not correctly represent the law of Massachusetts. In *Chaddock v. Briggs*, 13 Mass. 248, 7 Am. Dec. 137, which was decided when drunkenness was not a crime in Massachusetts, and when the habits in respect to drinking intoxicating liquors were freer than at present, it was held that to charge a clergyman with a single act of drunkenness was actionable *per se*. The decision of course rested on the ground that it injured him in his profession; the court saying, "A pure and even unsuspected moral character being necessary to their usefulness in the community." That case has never since been questioned in this state, and it is inconsistent with the general

doctrine that the words must impute either ignorance or want of skill, or some misconduct while actually performing the duties or functions of the profession or office.

In the present case, it must now be assumed that the jury found, under the instructions which were given to them, that the defendant falsely, and with a deliberate purpose and intent of injuring the plaintiff in his profession, and for the purpose of gratifying his ill-will towards the plaintiff, spoke the words in question. These words did not merely instruct the congregation that the effect of a second marriage, under the circumstances which existed, was to excommunicate the plaintiff from the Catholic Church; but they proceeded to impute against the plaintiff that such marriage or such excommunication should debar him from being employed as a physician in the parish, and that patients who employed the plaintiff as a physician could not in their sickness have the ministrations of the defendant as their priest. The question is, Does this imputation affect him, or, in the words of Comyn, touch him in his capacity as a physician? It seems to be a palpable straining of language to say that it does not. It imports not only that the plaintiff was not in himself a suitable person for a Catholic community to employ as a physician, but that if employed the patients must lose the attendance of the priest. But the jury might well find that the plaintiff was a suitable person to be employed there as a physician, notwithstanding his marriage and its ecclesiastical consequences.

The defendant assumed to stand in a position of authority; by virtue of this position he was able to exert a special influence upon his people; he assumed to assert and to exercise this influence; and his words amounted, in the opinion of the jury, to a plain departure from the proper exercise of such influence, and virtually to an instruction that the plaintiff was an unsuitable and improper person to be employed as a physician, and a direction not to employ him, on pain of losing caste in the church, and of losing the benefit of the defendant's ministrations as priest if they should be sick. The words were also susceptible of the meaning that the plaintiff was an unfit man even to be met socially; and that the defendant would not sit at the same table with him. Under these circumstances, the court cannot lay down a rule that the words did not touch the plaintiff in his profession. According to the verdict of the jury, they were designed to touch him, and did touch him

effectually, in his profession. The language of Parke, B., in *Southes v. Denny*, 1 Ex. 196, 202, 203, supports this view.

In the opinion of a majority of the court, the words might therefore properly be found by the jury to have been spoken of the plaintiff in respect to his profession as a physician, and they might properly be found to be defamatory and actionable without an averment of special damages. See, as supporting this result, *Sanderson v. Caldwell*, 45 N. Y. 398, 405, 6 Am. Rep. 105, where the court formulates a rule which would include this case.

The minor questions in the case may be briefly disposed of.

If an averment of special damages was necessary, or if the words set forth were actionable *per se*, in either case the evidence of special damage was properly received.

The evidence of what the defendant said after the commencement of the action was competent upon the question of malice: *Beals v. Thompson*, 149 Mass. 405.

The judge properly refused to instruct the jury that the plaintiff could not recover by reason of a variance. Taking the testimony of the various witnesses, there was, from some one or other of them, evidence substantially in support of all the words set forth in the declaration.

It was competent for the jury to find that the defendant spoke the words maliciously for the purpose of injuring the plaintiff as a physician.

Exceptions overruled.

SLANDER — WORDS SLANDEROUS PER SE. — As to what words are slanderous *per se*, see *Hess v. Sparks*, 44 Kan. 465, *ante*, page 300, and note.

SLANDER — DAMAGES. — In actions of slander, where the words are not actionable *per se*, the plaintiff must allege and prove special damages: *Newman v. Stein*, 75 Mich. 402; 13 Am. St. Rep. 447, and note.

LADD v. CITY OF BOSTON.

[181 MASSACHUSETTS, 565.]

EASEMENTS. — RIGHT TO HAVE LAND BUILT UPON FOR THE BENEFIT OF LIGHT AND AIR to neighboring land may by deed be made an easement, and may be created by words of covenant as well as by words of grant.

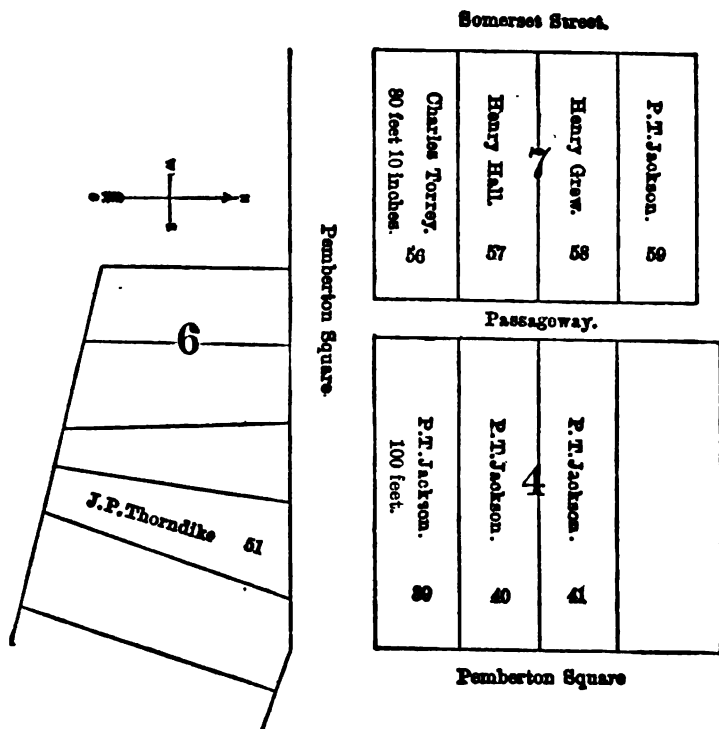
EASEMENTS. — IN ORDER TO ATTACH AN EASEMENT TO A DOMINANT ESTATE, it is not necessary that it shall be created at the moment when either the dominant or the servient estate is created, if the purport of the deed is to create an easement for the benefit of the dominant estate.

EASEMENTS RESTRICTING THE USE OF LANDS. — If the owners of lots fronting upon a square of land in a city mutually agree that certain places, avenues, and passage-ways, as laid out upon a plat, shall remain open as an appurtenant to several lots, and that no building shall be erected upon certain lots within ten feet of the front line thereof, unless a majority of the owners shall so elect, nor shall any building extend above a specified height, such agreement entitles each of the owners to an easement, and if a city, in the exercise of the right of eminent domain, takes a lot which is subject to such easement in favor of an owner of another lot, it must compensate him for the loss of his easement.

PETITION to superior court, claiming that petitioner, on April 20, 1886, was the owner of land known as lot 51, together with a dwelling thereon, which lot formerly belonged to J. P. Thorndyke, and was shown on a plan of lots, dated October 6, 1835, situate on Pemberton Square, formerly known as Phillips Place, in Boston, and that petitioner was also, as the owner of such lot, entitled to rights and easements in lots 39, 40, and 41 of division 4, and lots 56, 57, 58, and 59 of division 6, and a six-foot passage-way shown on the same plan; that by an indenture of the same date of the said plan, duly recorded, and by another indenture, dated November 7, 1837, also recorded, an agreement was made "between Patrick T. Jackson, his heirs and assigns, and the owners of the balance of said sixty-four lots, their heirs and assigns, by which it was mutually agreed, in the strongest and most unmistakable terms, that the place, avenues, and passage-ways as laid out on said plan shall forever remain open and unencumbered as appurtenant to the several lots, to be used for all purposes requisite for the usual full enjoyment of such dwelling and warehouses and their appurtenances as shall be erected thereon, conformably to the provisions therein contained, and that no building shall be erected upon lots comprised in the fourth division within ten feet from the line thereof on Phillips Place, unless a majority of the owners shall elect to have swelled or circular fronts, in which case the swelled or circu-

lar portions may extend to any distance within seven feet of said line; nor shall any building extend westerly beyond sixty-five feet from said line at a greater height than ten feet above the level of the six-foot passage-way in the rear of and against the said lots respectively; and the fact is, that said owners, by a majority or otherwise, did not elect to have swelled or circular fronts; and the indentures aforesaid further provide that no building shall be erected upon the lots comprised in division numbered 7 extending easterly beyond the distance of sixty-six feet from Somerset Street at such a height that the eaves shall be above the floor of the first or principal story, excepting upon lot numbered 65; provided, however, that if, at any time thereafter, the owners of the said lots, or a majority of three fourths parts of them, shall consent to the waiver or discharge of any or either of the conditions abovementioned, then the same shall cease and determine upon the execution of a sealed instrument declaring such assent, and the recording of the same in the registry of deeds, and the several lots shall thenceforth be held by their respective owners free and released from all the conditions so intended to be released and discharged; and further, that a breach of any of the conditions above specified shall not work a forfeiture of the estate, but shall give to the said Jackson, his heirs or assigns, or the owner of any lot interested in such breach, full power and authority to enter upon the lot, with servants and instruments, and take down and remove any building that may have been erected in violation of such condition." The petition also alleged that no release of the abovementioned conditions had been made by the owners of lots; that the commissioners for the erection of a new court-house in Boston had taken lots 39 to 41 inclusive, and lots 56 to 59 inclusive, and the six-foot passage-way, together with the easements and privileges of the petitioner; that the street commissioners had never allowed or paid petitioner any damages occasioned to him by such taking; that petitioner was aggrieved "that his easements and privileges of light and air, and especially his view into the open area of Pemberton Square, and also an easement reserved to him by said indenture, shall have been taken away and destroyed and no compensation allowed him therefor"; and he asked for a jury to assess his damages. The respondent moved to dismiss the petition, on the ground that the petition did not show any taking of any estate, property, or land of the petitioner for which he

was entitled to compensation from the city. The motion was granted, and the petitioner appealed. The following plan shows a portion of the plan referred to, so far as it is material to the present controversy: —



I. R. Clark, for the petitioner.

T. M. Babson, for the respondent.

HOLMES, J. The ground of the motion to dismiss the petition is, that the petition does not show any taking of any estate of the petitioner for which the city of Boston is liable, and that is the only question upon which we pass. It may be that a separate petition ought to have been filed for each estate taken, but upon that we express no opinion at this stage. Neither do we express any opinion on the question of parties, or upon the effect of a previous petition having been filed in respect of some of the same lots, if such be the fact.

It appears that the petitioner's predecessor in title and the then owners of the land taken by the city for the new court-

house were parties to an indenture whereby it was covenanted, among other things, that the land in front of the petitioner's lot and just across the street should not be built upon beyond a certain line on what is now Pemberton Square, and should be subject to some other similar negative restrictions. This land the city has taken free of these restrictions. If the plaintiff has an easement, the city must pay for it.

The right to have land not built upon, for the benefit of the light, air, etc., of neighboring land, may be made an easement, within reasonable limits, by deed: *Brooks v. Reynolds*, 106 Mass. 31. And such an easement may be created by words of covenant, as well as by words of grant: *Hogan v. Barry*, 143 Mass. 538. In order to attach the easement to the dominant estate, it is not necessary that it should be created at the moment when either the dominant or the servient estate is conveyed, if the purport of the deed is to create an easement for the benefit of the dominant estate: *Louisville and Nashville R. R. Co. v. Koelle*, 104 Ill. 455; *Wetherell v. Brobst*, 23 Iowa, 586, 591; *Gale on Easements*, 6th ed., 59. Of course it does not matter that by the same deed numerous parties grant similar or reciprocal easements over, or in favor of, many parcels of land: *Tobey v. Moore*, 130 Mass. 448; *Beals v. Case*, 138 Mass. 138, 140. Neither is it material that the indenture provides that a majority of three fourths of the owners of the lots concerned may terminate the rights which it creates.

If, then, we are to assume that at the time of the indenture the owner of the petitioner's lot was a different person from the owner of the opposite lot taken by the city, we have a plain case of a grant of easements to have certain parts of the latter not built upon, or not built upon above a certain height. Such would seem to have been the fact from the plan, referred to in the petition, which was exhibited to us at the argument, and from the petition itself, which states that the petitioner's right acquired under the indenture was an easement.

It follows that we need not consider the argument for the city, that owners of purely equitable restrictions are not entitled to maintain a petition of this nature.

Motion overruled.

COVENANTS RESTRICTING THE USE OF LAND. — Among the numerous attempts at a comprehensive statement of the legal doctrine on this subject, we may quote that of Professor Washburn: "It is now generally held that when land is divided up by the owner into numerous lots, and sold, and in every deed

a condition or restriction is inserted, which is shown, either by its nature, or position of the property, or words of the deed, or other evidence, to be inserted for the benefit of the other lots, there is created a perpetual servitude upon the land in favor of the other lots": Washburn on Easements, 4th ed., 118. The following statement of the rule was made by Mr. Justice Soule, in a case in Massachusetts: "It often happens that owners of land, which they design to put into the market in lots for dwelling-houses, insert in the deeds of the several lots a uniform set of restrictions as to the purposes for which the land may be used, and as to the portions of it which may be covered by buildings. So far as these restrictions are reasonable in their character, they are upheld and enforced by courts of equity in favor of the original owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to set the restrictions at naught": *Sanborn v. Rice*, 129 Mass. 387, 396. "That such a purpose is a legitimate one, and may be carried out consistently with the rules of law, by reasonable and proper covenants, conditions, or restrictions cannot be doubted. Every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade": *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715. Nor can there be any doubt that in whatever form a restraint is placed on real estate by the terms of the grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding, as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both at law and equity: *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715.

The fact that the deed contains a condition of forfeiture of the estate and reverter of title for a violation of the covenant does not oust the remedy of the covenantee in equity. On the contrary, the remedy in equity, being less severe to the vendor, is more reasonable, and hence to be preferred: *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363. That the fact that a penalty or forfeiture is imposed for doing a prohibited act affords no objection to the interposition of equity to enjoin the doing of the act, see *Coles v. Sims*, Kay, 56; *Barrett v. Blagrove*, 5 Ves. 555; *Harley v. Martin*, 1 Cox, 26. On analogous grounds, specific performance will be decreed, notwithstanding the contract liquidates the damages: *Fox v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 10 Jur., N. S., 1123. Equity will not enforce the condition of forfeiture, because equity does not decree forfeitures; that condition is enforceable only in the legal forum: *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363. That equity will not enforce forfeitures, see *Orans v. Dwyer*, 9 Mich. 350; 80 Am. Dec. 87; *White v. Port Huron etc. R. R. Co.*, 13 Mich. 356; *Wing v. Bailey*, 14 Mich. 83; *Horsburg v. Baker*, 1 Pet. 232; *Livingstone v. Tompkins*, 4 Johns. Ch. 415; 8 Am. Dec. 598; *Smith v. Jewett*, 40 N. H. 539; *Warner v. Bennett*, 31 Conn. 468.

If the covenant of reservation is one which the parties have the right to make, the original covenantee will be entitled to the aid of a court of equity to restrain its violation as long as he lives and remains the owner of

the property, although it may be a covenant personal to him and not running with the land: *Parker v. Nightingale*, 6 Allen, 341; 83 Am. Dec. 632; *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715; *Badger v. Boardman*, 16 Gray, 559; *Peck v. Conway*, 119 Mass. 546.

There is, of course, no doubt that as between the covenantor and the covenantee the latter may maintain an action for damages for a breach of the covenant; and it is equally clear that he may have an injunction to restrain its breach without showing actual damage: *German v. Chapman*, 7 Ch. Div. 271; *Richards v. Revitt*, 7 Ch. Div. 226; *Hall v. Westler*, 7 Mo. App. 56, 62. And where there has been a sale of a large tract of land laid off into lots upon the condition of certain restrictions in the use of every one of the lots, which restrictions are inserted in every one of the deeds, one of the vendees, it has been held, is equally entitled to an injunction against another of the vendees to restrain him from violating the restrictions, irrespective of the question of actual damages: *Hall v. Westler*, 7 Mo. App. 56, 62.

Where land is sold subject to such a restrictive covenant, and the language of the deed and the situation of the land with reference to other land of the grantor retained are such as to make it clear that the restriction in the deed upon the use of the land sold was intended for the benefit of the land retained, this is held to create a negative easement, or, as the courts sometimes say, an equity in the land sold for the benefit of the land retained, such as binds all the successors in title of the land subject to the easement, provided they have notice thereof, express or constructive: *Tulk v. Moxhay*, 2 Phill. Ch. 774; *Whatman v. Gibson*, 9 Sim. 196, 207; *Mann v. Stephens*, 15 Sim. 377; *Coles v. Sims*, Kay, 56, 69; *Child v. Douglas*, Kay, 560, 571; *Jeffries v. Jeffries*, 117 Mass. 185; *Sanborn v. Rice*, 129 Mass. 396; *Parker v. Nightingale*, 6 Allen, 341; 83 Am. Dec. 632; *Peck v. Conway*, 119 Mass. 546, 549; *Whitney v. Union R'y Co.*, 11 Gray, 359, 364; 71 Am. Dec. 715; *Renals v. Cowlishaw*, 9 Ch. Div. 125, 129; affirmed, 11 Ch. Div. 866; *Clark v. Martin*, 49 Pa. St. 289; *Western v. McDermott*, L. R. 1 Eq., 499, 504; affirmed, L. R. 2 Ch. 72; *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218; *Barrow v. Richard*, 8 Paige, 354; *Brouwer v. Jones*, 23 Barb. 153; *Linsee v. Mixer*, 101 Mass. 512; *Gilbert v. Peteler*, 38 N. Y. 165; 97 Am. Dec. 785; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Watrous v. Allen*, 57 Mich. 362; 58 Am. Rep. 363. This doctrine is variously expressed in judicial opinions. Such a restriction has been held to be in the nature of a servitude, the benefit of which would become attached to the other estates retained or contemporaneously or subsequently conveyed by the grantor as a legal right or easement, and would pass with them as appurtenant: *Jeffries v. Jeffries*, 117 Mass. 185. To the same effect are *Peck v. Conway*, 119 Mass. 546, 549; *Whitney v. Union R'y Co.*, 11 Gray, 359, 364; 71 Am. Dec. 715. The doctrine has been expressed with great clearness by Bigelow, J., in the case last cited, which may perhaps be regarded as the leading American case on the question. The doctrine was thus expressed by Vice-Chancellor Hall, after reviewing the previous decisions in the English courts of chancery on the subject: "Any one who has acquired land, being one of several lots laid out for sale or building plots, where the court is satisfied it was the intention that each one of the several purchasers should be bound by, and should as against the others have the benefit of, the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and this right, that is, the benefit of the covenant, inures to the assign of the first purchaser, — in other words, runs with the land of such purchaser. . . . This right," continued he, "exists not only where the several parties execute

a mutual covenant, but wherever the mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor, upon their heirs, where his vendor has contracted with him that he shall be the assign of it; that is, of the benefit of the covenant. And such a covenant need not be expressed, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important": *Renals v. Cowlishaw*, 9 Ch. Div. 125, 129. This decision was affirmed on appeal, and one of the lords justices (Baggallay) went so far as to adopt entirely the language of Vice-Chancellor Hall, above quoted.

It is not to be supposed from the foregoing that it is at all necessary, in order to have such a covenant enforced for the benefit of adjoining or adjacent land, that it should be, in a technical sense, a covenant running with the land conveyed by the deed which contains the covenant. "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform": *Whitney v. Union R'y Co.*, 11 Gray, 359, 364; 71 Am. Dec. 715, 718; opinion by Bigelow, J. In the leading English case in which the principle upon which courts of equity grant relief was formulated and applied by Lord-Chancellor Cottenham, that eminent judge said: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land in a particular way, is what I never knew disputed. Besides that, the covenant being one which does not run with the land, this court cannot enforce it. But the case is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by the vendor, and with notice of which he purchased. Of course the price will be affected by the covenant." And again he said: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement, and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased": *Tulk Mochay*, 1 Phill. Ch. 774, 777; quoted in *Keates v. Lyon*, L. R. 4 Ch. 222, and recognized in *Child v. Douglas*, Kay, 580. Quoting this language, it has been added by Lord Justice Selwyn: "The questions which have arisen with respect to the devolution of the benefit of covenants of this kind have been decided upon similar principles, and equally without reference to any technical objections depending upon the covenants running or not running with

the land": *Keates v. Lyon*, L. R. 4 Ch. 223. So in a later case, it is said by Vice-Chancellor Hall: "It is now well settled that the burden of a covenant entered into by a grantee, in fee, for himself, his heirs and assigns, although not running with the land, at law, so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, he having notice thereof": *Renals v. Cowlishaw*, 9 Ch. Div. 125, 129. It may be suggested, though not with absolute confidence, that the only distinction under this head is this: if the covenant is one which technically runs with the land, it may bind the successors in title of the original covenantor, irrespective of the question of notice; for they would be held to take the land subject to any burdens attaching to it under the strict rules of law, whether they had notice of such burdens or not; whereas if the covenant does not run with the land, they must have notice of it, actual or constructive; otherwise they occupy in respect of it the attitude of *bona fide* purchasers without notice, and it cannot be enforced against them in a court of equity.

Where the covenants are mutual, there is no difficulty whatever in dealing with this question. Thus where the owner of a particular piece of land, on which a row of houses was intended to be built, executed a deed reciting that it had been laid out, and was intended to be dealt with in a particular manner, and declared that it should be a general and indispensable condition of the sale of all or any part of that land that the several proprietors, for the time being, should observe and abide by the several restrictions and stipulations therein contained, and that he himself would at all times observe the like restrictions and stipulations, and these restrictions and stipulations were also enforced by mutual covenants, — although the question afterwards arose between subsequent purchasers of different portions of this piece of land, — it was held the owner was bound by, and that the other was entitled to enforce, the covenants: *Whitman v. Gibson*, 9 Sim. 196; decision by Vice-Chancellor Shadwell. But while, in the absence of special circumstances rendering the enforcement of such a covenant inequitable, which will be spoken of hereafter, the fact that the grantor entered into similar covenants on his part in respect of the land retained places the right of a successor in title of such land to equitable relief in the form of an enforcement of the covenant or of an injunction to restrain its violation, entirely beyond question, yet it is not to be inferred from this that it is at all necessary, in order to such equitable relief, that there should be a mutuality of covenants. This is made very clear by the opinion of Sir W. Page-Wood (afterwards Lord Hatherley). He ruled that the objection to a motion for a restraining order that there were no reciprocal covenants was "no real objection." "It only amounts to this," said he, "that the defendant, Douglas, has covenanted with the vendor not to perform certain acts, and has not thought fit to make the vendor enter into a covenant with him to take similar covenants from the future purchasers of the remaining land. The reciprocal advantage he reobtained by Douglas is really the conveyance of the land; and it cannot be said that for the want of a reciprocal benefit which he did not stipulate for he cannot be compelled to perform that which he has expressly covenanted to do." Further on, he said: "I have felt some difficulty throughout in seeing how reciprocity could have anything to do with the question. Where a part of the remaining property of the vendor has been sold to another person, who must be said to have bought the benefit of the former purchaser's covenant, and more especially when the subsequent purchaser has entered into a similar covenant on his own part, he must be said to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant

was in fact inserted in the other purchaser's deeds, because he must be taken to have bought all the rights connected with this portion of the land": *Child v. Douglas, Kay*, 560, 569-571.

Where an owner of property divides it and sells a portion of it, and inserts in the deed of conveyance a restriction as to the use of the portion sold, it is very easy to insert in the deed a statement that this restriction is intended for the benefit of the land retained; for, as we shall see hereafter, this will not be presumed in all cases, and cases are found in the books where the absence of such a statement has been regarded as an important ingredient in a collection of circumstances influencing the court in its determination to refuse equitable relief. See, for instance, *Renals v. Cowlishaw*, 9 Ch. Div. 125; affirmed, 11 Ch. Div. 866. But it is not to be inferred that it is at all necessary to equitable relief that this purpose should be expressed in the deed. If from the situation of the land retained with reference to that conveyed, or from other attending circumstances, it becomes clear that it was the intention of the parties to grant a negative easement in the land sold for the benefit of the land retained, it does not make any difference whatever that this purpose is not expressed in the deed; and indeed in most of the cases where equitable relief has been granted the purpose was not so expressed: *Mason v. Stephens*, 15 Sim. 379; *Patching v. Dubbins*, Kay, 1; 2 Week. Rep. 2; *McLean v. McCay*, 21 Week. Rep. 798; *Peck v. Conway*, 119 Mass. 546; *Green v. Creighton*, 7 R. I. 1; *Barrow v. Richard*, 8 Paige, 351; 35 Am. Dec. 713; *St. Andrew's Church Appeal*, 67 Pa. St. 512; *Clark v. Martin*, 49 Pa. St. 269. The reason is, that there could be no object in so stipulating except for the benefit of the land affected beneficially by the stipulation. As was said by Sir Montague Smith, in giving the judgment of the privy council: "There could be no object in stipulating that it [the land] should be left open for the benefit of both parties, unless it meant for the benefit of both parties as owners of the lands which adjoin the plat. Therefore the implication is natural and irresistible, that when the parties speak of leaving this piece open for the common benefit of both, they mean for the common benefit of both as holders of the adjoining lands": *McLean v. McCay*, 21 Week. Rep. 798.

According to a holding of the court of appeals of New York, it is not even necessary that the restrictive agreement should be put in any deed of conveyance, or that it should be shown by any writing. In that case, the owner of lots on both sides of a city street made a plan exhibiting a street as widened eight feet on each side, and represented to several vendees of different lots that all the buildings to be erected on the lots which he had sold and should sell should stand back eight feet from the line of the street. The vendees erected buildings in conformity with this plan, none of them being restricted by their conveyances or bound by any covenant in respect to the extent or the mode of their occupation. It was held that a subsequent purchaser of one of these lots, with constructive notice of the facts, was not entitled, as against another purchaser, to build upon the eight feet adjoining the street. After conceding that the conclusion of the court could not be supported upon the principle that the eight-foot strip had been dedicated to public use, Sutherland, J., in giving the opinion of the court, said: "From the facts found by the judge at special term, it appears that when the plaintiff Maxwell and others bought lots in St. Mark's Place of Davis they were shown the map or plan of St. Mark's Place, showing that the houses on both sides of the place were to be set back eight feet from the street, and that they bought on the assurance of Davis that that plan should be observed in building on the place; that the strips of eight feet in width on both sides

of the street should not be built upon, but kept open. It is to be presumed that they would not have bought and paid their money except upon this assurance. It is to be presumed that, relying upon this assurance, they paid a larger price for the lots than otherwise they would have paid. Selling and conveying the lots under such circumstances and with such assurances, they therefore bound Davis, in equity and good conscience, to use and dispose of all the remaining lots so that the assurances upon which Maxwell and others had bought their lots would be kept or fulfilled. This equity attached to the remaining lots, so that any one subsequently purchasing from Davis any one or more of the remaining lots, with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity": *Tulmudge v. East River Bank*, 26 N. Y. 106, 107. The meaning of this, of course, is, that such an equity or negative easement in land for the benefit of adjacent land may be created by a parol agreement or understanding between the original owner and purchasers of different parts of the land, and that notice of this agreement, actual or constructive, will bind a subsequent purchaser of one of the tracts in like manner as it would have bound the original owner, from whom he purchased. This case stretches the doctrine of preceding cases further than any case in the books known to the writer.

It has been held to be sufficient that the defendant buys with notice that it is claimed that there are restrictions which will prevent the defendant from acquiring a right, as purchaser of the lots, to build outside of a prescribed building line. It has been also said that the uniformity of the position of all the houses which have previously been built, namely, the fact that they all front upon one line, is probably sufficient alone to put a subsequent purchaser on inquiry as to the existence of an agreement for a building line: *Tulmudge v. East River Bank*, 26 N. Y. 106, 111. It is the settled law that in order to sustain a proceeding in equity to restrain the violation of such a restriction it must be shown that the defendant took the land with notice, either express or constructive, that the restriction existed, and that it was intended for the benefit of the plaintiff's estate. In declaring this principle, it has been added: "It is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff which in equity, by accepting the grant, the defendant would be bound to observe": *Badger v. Boardman*, 16 Gray, 559, 561; citing *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715. In conformity with this view, the general rule has been stated to be, that if parties purchase land with notice of a covenant concerning it, but which does not run with the land, equity will not permit them to do anything contrary to the true meaning of that covenant: *Tulk v. Moxhay*, 2 Phill. Ch. 774; *Patching v. Dubbins*, Kay, 1. But on this subject it has been ruled that the owner of the land charged with such servitude is bound by the covenants in the deed of his remote grantor by which it was created, although it is not mentioned at all in the deed under which he immediately takes, that is, in the deed to him, and although he has no knowledge of it in fact; for as he derives his title under a deed which contains the covenant, he is bound to take notice of its provisions: *Peck v. Conroy*, 119 Mass. 546; citing to this point, *Whitney v. Union R'y Co.*, 11 Gray, 359; 71 Am. Dec. 715. Upon the question, What will amount to evidence of notice in a particular case? it has been ruled that where land had been laid out for building a row of houses on a general plan, according to which no

building was to be erected within six feet from the projected road in front of the row, a purchaser of one of the plats, being aware of the general scheme, and buying subject to the terms of the printed form of contract relating to the whole estate, which restrained him from building within six feet from the road, and knowing that another plat had been previously sold and built upon according to the general scheme, must have been considered to have known that the previous purchaser had bought subject to a similar restriction: *Child v. Douglas*, Kay, 555. It is believed that in respect of this question of notice there is a distinction between notice of the fact of the covenant and notice of the effect of it. The distinction is believed to be that stated above, that the owner of land will be conclusively presumed to have notice of any covenant in a deed which constitutes his chain of title, and that in so far as that covenant necessarily burdens his land he takes subject to it, whether he has actual notice of it or not. This seems to be an unavoidable conclusion from the truism that a grantee takes only what his grantor conveys. On the other hand, although there may be a restrictive covenant in his chain of title, it does not follow that he will have notice from the words of the covenant themselves that the effect of the covenant is to impose a servitude upon his land for the benefit of adjoining or adjacent land belonging to some one else; the language of the deed may be equally consistent with a purpose on the part of the covenantee to impose the restriction for his own personal benefit to effect some present or collateral purpose of his own. It is upon this distinction that nearly all the cases separate.

It must be constantly kept in mind that in every case of this kind the paramount and controlling question to be determined by the chancellor upon an interpretation of the deed containing the covenant, in connection with the surrounding circumstances and other applicatory evidence, is, whether the covenant was really intended for the benefit of the land retained, or whether it was intended to subserve some purpose personal to the covenantee, so that after parting with the land retained he might be still at liberty to release the covenant at his pleasure. As a general rule, such a covenant will be regarded as having been intended for the benefit of other land retained by the covenantee, since, as a general rule, it could have no other purpose. This will be obvious if we consider the case of an owner of two adjoining city lots selling one of them and imposing upon it a restriction as to the manner in which it shall be used; prohibiting its use for a livery-stable, a dram-shop, or the like; or prescribing a building line within a given distance from the line of the street on which it fronts. In such a case it is difficult to understand that the covenant could have had any other purpose than to benefit the land retained by prohibiting uses of the land sold, which, though not unlawful, would work more or less annoyance to an occupier of the land retained, and further diminish its value. If after imposing such a restriction upon the use of the land sold for the benefit of the land retained the owner subsequently sells the land retained to another grantee, it is undeniably logical and obviously just that the negative easement or equity which he has created in the land first sold for the benefit of the land afterwards sold passes to the second grantee and to his successors indefinitely. At least, equity will so regard it; for this is the sense and substance of the engagement. In giving the opinion of the supreme court of Pennsylvania so holding, *Lowrie, C. J.*, said: "In a proceeding in the common-law form, it would be necessary to inquire into the form in which the right is reserved, in order to decide whether it should be sued for as a condition or a covenant, or as a simple contract. But in the equity form of proceeding we inquire only into its sub-

stantial elements, — What does it assure, and to whom? Here the duty of the defendant is so plain that one may read it running; it is clearly inscribed on every link of the chain of his title to the lot. He took his title expressly on the terms already briefly mentioned. He was not to erect on the back part of his lot any building higher than ten feet, afterwards changed to eleven. To whom, then, does he owe the duty? No one doubts that it is to the grantor, who reserved or imposed the duty, and to his heirs and assigns. But did the grantor reserve this duty to himself, his heirs and assigns, as a mere personal duty, and thus retain in himself or them the vain right of saying: 'That lot is not mine, but the owner is subject to my pleasure in the mode of building on it'? Common sense forbids this, and the law would not allow itself to be troubled with such vain engagements. . . . Common sense cannot doubt its purpose, and thus it becomes plain that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be. Very plainly, also, it is a duty that admits the right of the owner of the adjoining lot to have the privilege or appurtenance of light and air over the defendant's lot; and that admits this to be so far subject or servient to that, that the buildings on this must, for the benefit of that, be so limited in height, according to the condition of the deeds. So such stipulations are always regarded when the form of remedy is selected and allowed, which can admit of treating the case according to the very substance of the contract": *Clark v. Martin*, 49 Pa. St. 239, 297.

But in many cases the courts have found that such covenants were not intended by the covenantee for the benefit of any land retained by him. In one case, Sir C. J. Selwyn, L. J., answering an argument that such was necessarily the effect of such a covenant, said: "It is obvious that such a definition does not meet all cases, for cases may be put, in which a vendor might lawfully and reasonably insist upon such covenants, even when the covenants comprised the whole of the property to which he was entitled at the date of the covenant, — as in the case of the purchase and sale of a strip of land adjoining a large park by a person who had at the time no interest in the park, but who hoped to inherit or purchase it. Assuming the vendor of the strip of land to purchase or inherit the park, and to sue the purchaser for breach of the covenant, the purchaser of the strip of land would, in a court of equity, be unable to justify a violation of the covenant by reason of the injury sustained by the vendor having arisen only in consequence of his subsequent acquisition of the park": *Keates v. Lyon*, L. R. 4 Ch. 218, 227. The doctrine, then, is, that an owner or lessee of land cannot have relief in equity in the form of an enforcement of such a covenant, or have an injunction against its violation, unless the court can infer from the language of the deed in which the covenant is contained, when construed in reference to the surrounding circumstances, an intention, on the part of the parties to the deed, to insert the covenant therein for the benefit of the particular property acquired by the plaintiff. Affirming this principle, it has been said: "Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance, or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed": *Badger v. Boardman*, 16 Gray, 559, 560; opinion by Bigelow, C. J. In another case the doctrine was thus stated by the same learned judge: "It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial

and advantageous the occupation of the estate granted, when it should become divided into separate parcels; and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases inure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it or any part of it subject to the condition. Indeed, no restriction on the use of land, and no condition annexed to its possession and enjoyment, can be for the benefit of the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. Inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition, as such, imposed on its use or enjoyment by any prior grantor": *Jewell v. Lee*, 14 Allen, 145, 149; 92 Am. Dec. 744.

Where the covenant is by the vendor himself, the rule is, that the restriction is taken most strongly against him, modified by the necessity of giving effect to every portion of the instrument, so far as it can reasonably be done. A good illustration of this is found in a case where the vendor of a number of building lots in a terrace inserted in each deed a covenant, *on his part* unexplained by any recital in the deed, that no building should be erected on any part of the land of the vendor lying on the east side of the terrace, *and opposite to the plat of land thereby conveyed*. It was held by Sir W. Page-Wood, V. C. (afterwards Lord Hatherley), that the words above italicized were not merely descriptive of the position of the land, but that they restricted the general meaning of the former words; and that the covenant applied only to that part of the land which lay immediately opposite the lot of the covenantee in the particular deed. In the course of his opinion, he said: "There is no recital in this deed of an intention of any kind, and therefore the question is narrowed to the very words of the covenant itself. I had at first an inclination of opinion that if the words were doubtful, and it could be construed in favor of the defendants, the general rule would be this: that it being equivalent to a grant on the part of the vendor, the construction must be taken most strongly against the grantor. But, on the other hand, there is another rule of construction well established, namely, that it is right to give effect to every word, if it can reasonably and properly be done. I do not feel, therefore, at liberty to say that it is doubtful if in putting one construction upon this covenant I give complete effect to all the words, whereas I should be leaving a portion of the words without effect in giving to the covenant a contrary construction. If I take the construction of the plaintiff, I strike the words 'and opposite to the plat of land' out of the covenant; that is, the covenant would be just as intelligible in the sense of the plaintiff without those words as with them, or indeed much clearer. It would be effective if it were only 'any part of the land lying on the east side of the said terrace.' Those words alone would have given the plaintiff the right for which he now contends. Am I at liberty to say that the other words are superfluous, and wholly ineffective, and are merely thrown in as additional description? I do not think that would be a sound construction. The phraseology would be ill-selected. What I should have expected would have been 'lying on the east side of the

terrace,' or 'opposite to the terrace.' I do not see why the definition 'opposite' should be confined to opposite to the particular piece of land thereby conveyed, if the parties were stipulating to have the whole of the land unbuilt upon opposite the terrace. If that were the intention, it would have been clearly expressed on both sides, and there would not have been a distinct reference to the particular plat of land conveyed. The construction, therefore, which makes every word operative would be, that there should be no building on the piece of land lying to the east of the terrace and also opposite to the plat conveyed; and then the word 'opposite' becomes more definite, and the land must possess both the qualities of being on the east side and also opposite. The scheme was, that this gentleman, being minded to make a terrace, and to give every person some land opposite to his house, free from buildings, makes a particular covenant with each person in the terrace that the piece of land opposite his house should not be built upon; and if the terrace had been completed, each party would have had his house, and a piece of land opposite unbuilt upon; and in a certain sense, though very inadequately, there would have been a security that the whole land should not be built upon. But in that case every one would have had to rely upon his neighbor, as either of them might have released his covenant, and it might have been reduced to this, that one might be left with only a strip of land opposite unbuilt upon to enable him to look from his own windows to the distant country, and to obtain light and air. That would be a very improbable agreement; still, it is not a benefit to be altogether despised, or so utterly improbable a contract as to authorize me to give a more extended operation to the covenant. I am therefore compelled to come to the conclusion, looking to the absence of the recital of an intention that the whole of the land should not be built upon, and to the covenant alone, and the effect which I am bound to give to every word if it can have a distinct legal bearing and is not mere tautology, — I am reluctantly compelled to decide that the meaning is such as I have described, and that the plaintiff is not entitled to relief": *Patching v. Dubbins*, Kay, 1, 14.

Where the covenant is, not to build within a certain distance from the street on which the land is bounded, the erection of a bay-window, which has the effect of carrying the front line of the building forward beyond the building line so agreed upon, and to that extent obstructing the lateral view of other owners, is a violation of the covenant, and will be enjoined in equity; and this, although the structure does not rest upon the ground, but is extended out from the house at a distance of four feet above the ground, and from that point to the top of the building. In so holding, the court, speaking through Mr. Justice Soule, said: "We cannot regard this addition as an ordinary projection or variation in detail in the arrangement and ornamentation of the front of the house, which the parties to the deed from the city may have contemplated as being proper under the provisions of the deed. The addition is, in substance and effect, a removal of the front line of the house three feet and three inches nearer to the street than the deed permits. The effect on the adjoining estates is substantially the same as if the addition were supported by a wall rising from the ground perpendicularly to its front line instead of being supported, as it now is": *Sanborn v. Rice*, 129 Mass. 387, 397.

The deed of a lot of ground bounded on a street contained a condition that "no dwelling-house or other building shall be erected on the rear of said lot." The deed also recited that the building then on the land conformed to the condition. In view of this recital it was held that the deed presented

no ambiguity, but that all that part of the lot described in the deed which lay behind the house was to be regarded as "the rear of said lot," within the meaning of the condition under consideration. It was accordingly held that the erection of an L in the rear of the house, which originally stood on the lot, about seventeen feet wide, and of a height equal to the height of the house, was a violation of the condition, such as warranted relief by injunction: *Sanborn v. Rice*, 129 Mass. 387, 397.

From this it follows that where the covenant is intended for the benefit of land retained by the covenantor, and he has afterwards parted with such land to another vendee, he cannot thereafter release the covenant, because he cannot do anything in derogation of the rights of his subsequent vendee. The covenant having passed with the land to the vendee, and inured to his benefit as an easement annexed to his land, and as there is a reasonable presumption that the existence of the easement was taken into consideration in fixing the purchase price of the land, the original vendor cannot release it, or otherwise deprive his vendee of the benefit of it, any more than he could arbitrarily reclaim the whole property from his vendee. The right is in the nature of property; it has been purchased and paid for; it is vested; it is therefore under the protection of the law, and cannot be divested by the mere act of the vendor. The rule is, that where the vendor sells a portion of his land, and retains a portion, and makes a covenant of this kind with his vendee, and requires the same covenant from his vendee, these covenants create reciprocal rights and obligations, which are handed down from successor to successor, indefinitely, so that a purchaser who receives a substantial injury from a breach of such a covenant is entitled to the aid of a court of equity for redress by injunction: *Western v. McDermot*, L. R. 1 Eq. 499, 504. And even where the second purchaser did not actually know that the previous purchaser had bought subject to a similar restriction, still, where he had purchased all the rights of his vendors relating to a particular plat of land, it became impossible for the vendors, from the time of his purchase, to release the former purchaser from his covenant not to build within six feet of the road, or to alter in any respect their rights against him: *Child v. Douglas, Kay*, 575. But it is obvious that the covenantor can at any time release the covenant, so far as his own personal rights are concerned; and where the covenants are not reciprocal, according to the observation of Lord Eldon, if the landlord releases some of the tenants from their covenants, this, as against the landlord himself, has the effect of releasing all. He said: "The landlord, in such a case, is stipulating not only for his own benefit, but for the benefit of all the tenants in that neighborhood. If, therefore, the landlord, in some particular instance, lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant, to whom he has not given such a license. He may have a good case for damages at law; but if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot with any justice come into equity for an injunction against those tenants. It is not a question of mere acquiescence; but in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all. In such cases I have always understood this court will leave the parties to their remedy at law": *Roper v. Williams*, Turn. & R. 18, 22.

It is obvious that the original covenantor may by his conduct estop himself from enforcing the covenant, although he may never have formally released it. Such a case arises where the covenantor himself has allowed the cove-

nant to be violated by the owners of various lots in the scheme of improvement, until the character of the property has become so changed that to enforce against some of the lot-owners an obligation which has been released as to many of the others would be oppressive. This was the ground on which the two cases just cited were decided. In the former of them, the Duke of Bedford, being the owner of all the property in the neighborhood of the British Museum, for the protection of a large part of that property known as Southampton House, took a covenant from the persons to whom he sold or let other parts of the property, restricting them from building upon them otherwise than in a particular way. But he himself afterwards built upon a large part of the property which was originally intended not to be built upon, and having so built, he came to the court of chancery, asking it to restrain persons who wanted to build contrary to their covenant upon an adjoining part of the property. Lord Eldon held that this would not be done. Because the complainant had so altered the property since he compelled these persons to enter into the covenants, and had so completely changed the face of it by building houses which were against the covenant, and which the persons to whom he had granted building leases might have restrained him from building, it was held that it would be now inequitable to give him the benefit of the covenant which he himself had treated as absolutely void: *Duke of Bedford v. Trustees of British Museum*, 2 Mylne & K. 552. Another case, decided by a single judge, Mr. Justice Pearson, presents an application of the same principle. A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots entitled to the benefit of the covenant, not to build a shop on the land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beer-shop, to restrain him from breaking his covenant, and for damages. The defendant had, to the knowledge of the plaintiff, so used his house for three years before the action was commenced. There was evidence that several other houses built on other of the lots (one of them immediately opposite the plaintiff's house) had been for some time used as shops, notwithstanding the covenants, and that many of the houses adjoining the plaintiff's house were occupied, not each by a single tenant, but each by two families at equal rents. It was held that the character of the property had become so changed that the original purpose — of keeping all the estate as a residence property — for which the covenant had been entered into had failed, and that it would, under the circumstances, be inequitable to enforce the specific performance of the covenant: *Sayers v. Collyer*, 24 Ch. Div. 180. This is in conformity to an observation of Lord Eldon in dealing with such a case, where the plaintiff was the vendor and original covenantor: "Every relaxation which the plaintiff has permitted in allowing houses to be built in violation of the covenant amounts *pro tanto* to a dispensation of the obligation intended to be contracted by the defendant. Very little, in cases of this nature, is sufficient to show acquiescence; and courts of equity will not interfere unless the most active diligence has been exercised throughout the whole proceeding. . . . In every case of this sort, the party injured is bound to make immediate application to the court in the first instance, and cannot permit money to be expended by a person, even though he had notice of the covenant, and then apply for an injunction": *Roper v. Williams*, Turn. & R. 18, 22.

A good illustration of the doctrine that the original covenantee may lose the right to enforce such a covenant in respect of a particular lot is found in a decision of the court of appeals of Kentucky, in the case of *Duncan v. Central Passenger Ry Co.*, 85 Ky. 525, where a man owning certain unimproved city property laid it out on a plan by which it was intended to be sold for residences only. He sold and conveyed several of the lots to A, with the following clause in the deeds: "It is hereby agreed between the first and second parties that no business, manufacturing, or other than dwelling houses shall be built upon said property, and no alley shall run through said property, and no building of any kind shall be put thereon fronting any other way than on Highland Avenue or the said twenty-foot alley." He afterwards sold other lots to different persons without any restrictions whatever, and he made mortgages of the rest of the property without any restrictions therein. A conveyed the lots which he had thus purchased to a street-railway company, and they commenced the erection thereon of a stable for their horses. It was held that the original vendor was not entitled to have the railway company enjoined from erecting and maintaining their stable, since the evidence showed such an abandonment on his part of the original purposes in respect of the land which induced him to insert the above restriction, and since no other vendee of his was complaining. This decision really goes no further than to hold that the original vendee may by his conduct estop himself from insisting on the performance of such a covenant or agreement, but it does not touch the rights of his other vendees; though it would seem that under the circumstances of the Kentucky case the right to relief might well have been sustained on the theory that he represented them, being the person with whom the covenant had been made. The whole case shows that one of the purposes of the covenant was to keep out of the improvement the kind of a nuisance which was put there, — a horse-car stable, and it may be doubted whether the case was well decided.

The doctrine of the preceding paragraph can have no application to a case where the original vendor, having inserted such a covenant in his deed for the benefit of the land retained by him, has sold such land to another vendee; in such a case he may estop himself by his laches, but he cannot estop his subsequent vendee. Such was the qualification put upon this case, in a subsequent case, by Sir W. Page-Wood, V. C.: "The better view is, that a landlord in such a case having secured from the purchaser or lessee of part a particular benefit in respect of the land, if he afterwards sell the rest of the land, he must be taken to sell the benefit of that covenant also": *Child v. Douglas*, Kay, 560, 572. But it is equally clear that such subsequent vendee may estop himself by his laches or acquiescence from claiming equitable relief against a violation of the covenant. In a case where this principle was clearly recognized, it was held that the mere fact that the plaintiff in a suit in equity has acquiesced in other breaches of the same covenant by other assigns of the original vendor, or even that he has broken them himself in unimportant and harmless particulars, will not debar him from the right to relief in equity against a substantial and harmful violation of it. Thus where the covenant was against building in the garden attached to the house built on the ground originally conveyed, and also against allowing trees to grow in the garden above the height of eight feet, the plaintiff might restrain his neighbor from violating the covenant as to building, although he had permitted trees to grow in the gardens of others subject to the covenants, higher than eight feet, without making objection, and although he even

allowed such trees to grow in his own garden: *Western v. McDermot*, L. R. 1 Eq. 499, 507; affirmed, L. R. 2 Ch. 72.

A covenant, condition, or agreement in a deed of conveyance will not be enforced in equity, where such changes have taken place, since the deed was executed, as to render specific performance of the covenant inequitable. This is perhaps referable to the general maxim, *Lex non cogit ad vana seu impossibilia*. It is a branch of the general doctrine relating to relief in equity, in the form of the specific performance of agreements, that such relief will be withheld where, by reason of changes of circumstances, more injustice will be worked by decreeing than by refusing a specific performance; in which cases the parties are left to their remedies at law. This doctrine was well stated, with reference to the subject under consideration, by Danforth, J., in a case in the court of appeals of New York: "It certainly is not the doctrine of courts of equity to enforce by its peculiar mandate every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case; and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable (citing *Peters v. Delaplaine*, 49 N. Y. 362; *Margraf v. Muir*, 57 N. Y. 155; *Mathews v. Terwilliger*, 3 Barb. 51; *Radcliffe v. Warrington*, 12 Ves. 331). If for any reason, therefore, not referable to the defendant, an enforcement of the covenant would defeat either the ends contemplated by the parties, a court of equity might well refuse to inquire; or if in fact the condition of the property by which the premises are surrounded has been so altered 'that the terms and restrictions' of the covenant are no longer applicable to the existing state of things (citing 1 Story's Eq. Jur., 10th ed., sec. 750); and so, though the contract was fair and just when made, the interference of the court should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff": *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 317; 41 Am. Rep. 365; citing to the last proposition, *Thomson v. Harcourt*, 2 Brown Parl. Rep. 415; *Davis v. Hone*, 2 Schoales & L. 340; *Baily v. De Grespigny*, L. R. 4 Q. B. 180; *Clarke v. Rochester etc. R. R. Co.*, 18 Barb. 350. When, therefore, the deed recited that the object which the parties to the covenant had in view was "to provide for the better improvement of the lands, and to secure their permanent value," and the parties mutually covenanted for themselves, their heirs and assigns, that only dwelling-houses should be erected upon their respective premises, and that neither would permit or carry on "any stable, school-house, engine-house, tenement, or community house, or any kind of manufactory, trade, or business," on any part of said lands, and it appeared that at the time of the hearing of the suit in equity to enforce the covenant the neighborhood had become so changed by the growth and extension of business houses, and by the erection of an elevated railroad running opposite the second-story windows of the houses, as to render it undesirable for residence purposes, but nevertheless valuable for business purposes, it was held that, the entire purpose for which the covenant was inserted in the deed having failed, equity would not decree enforcement of the covenant, but would leave the plaintiffs to their remedy at law: *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365; on former appeal, *sub nom. Trustees of Columbia College v. Lynch*, 70 N. Y. 440; 28 Am. Rep. 615.

EVIDENCE OF THE INTENT. — The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate,

must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances: *Pect v. Conway*, 119 Mass. 546.

The importance of restraining the evidence which is heard upon the question of the intent of the parties to the language of the deed itself, at least when interpreted by the immediately surrounding circumstances, is shown by several cases, which lay stress upon the consideration that subsequent grantees who take with such restrictive covenants in their deeds have ordinarily no other means of knowing the purpose of the parties to the deed in which the covenant was first inserted, — whether or not it was intended to create a negative easement in favor of a particular piece of land which the original covenantee retained for himself, and perhaps subsequently sold. In a case where the action was at law to recover damages for the breach of such a covenant, the court, speaking through Morton, J., said: "The mere fact, which plaintiffs offered to prove, that Willis Buchanan, at the time when he conveyed to Monroe and others, was the owner of land separated from the estate granted by the Woburn Branch railroad, is not sufficient to show that the object of the restriction was to benefit the land. In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate. For anything that appears, it may have been intended only for the benefit of the grantor, and for his personal convenience": *Skinner v. Shepard*, 130 Mass. 180, 181; citing *Jeffries v. Jeffries*, 117 Mass. 184; *Jewell v. Lee*, 14 Allen, 145; 92 Am. Dec. 744; *Badger v. Boardman*, 16 Gray, 559.

It is with reference to this principle that evidence that the restriction contained in a particular deed was a part of a general plan becomes of the greatest importance, and in many cases controlling. But it ought to be carefully added that the fact that there is no evidence that a particular restriction was a part of a general plan does not negative the conclusion that it was intended for the benefit of a particular adjacent estate. The situation of the two parcels of land in respect of each other may be such as to render such a conclusion unavoidable, as, for instance, where a vendor sells one adjoining parcel with an agreement not to build upon the other, in which case the conclusion is unavoidable that he annexes to the parcel sold an easement of light, air, and view in respect of the parcel retained; but where the restriction is no part of a general plan, and there is nothing in the language of the deed, when interpreted by surrounding circumstances, from which it can be fairly inferred that the restriction was intended for the benefit of any particular piece of land retained by the vendor, the covenant cannot be enforced by one who subsequently acquires from the vendor the particular piece of land, nor by the vendor for the exclusive benefit of such subsequent purchaser: *Dana v. Wentworth*, 111 Mass. 291.

In determining whether such a restriction was intended for the benefit of particular adjacent lots or parcels of ground, an important evidentiary circumstance is, that similar restrictions were inserted in other deeds conveying such other lots or parcels, or that the deeds conveying such other lots or parcels contained references to the restrictive clause in the particular deed: *Badger v. Boardman*, 16 Gray, 559.

It may be extracted from the decision of Vice-Chancellor Shadwell that in case of a reversion the vendor will take the land back free from the restrictive covenants: *Schreiber v. Creed*, 10 Sim. 9. This is illustrated by a later

case in that country, where A sold a part of an estate to B, who entered into restrictive covenants for himself, his heirs and assigns, with A, his heirs, executors, and administrators, as to buildings on the property so sold, but did not enter into any as to the land retained. After this transaction, A sold to other persons various lots of the land retained, but nothing appeared as to other conveyances, nor was there any evidence that they were informed of the covenants entered into by B. After this, A bought back from B what he had sold to him. It was held by the court of appeal that the benefits of B's covenants did not in equity pass to the subsequent purchasers of other parts of the estate from A, and that A, after the repurchase, could make a title to the repurchased land discharged from the covenants: *Keeble v. Lyon*, L. R. 4 Ch. 218.

In one of the cases cited in the preceding paragraphs, where the covenant established a building line, and the prohibited distance had been by accident left blank in the former purchaser's covenant, without knowledge of the vendors, and they had a right to have the deed rectified, the second purchaser was held entitled to an injunction to restrain a breach of the covenant by the former purchaser; and it was held that as this right was entirely equitable, and might, if the covenant had been perfect, have been enforced in the absence of the original covenanting parties, an injunction might be granted without having the deed rectified, and without making the covenantee a party to the suit: *Ohild v. Douglas*, Kay, 575. Where the covenantor has built in violation of the covenant, the court will exercise its jurisdiction by a mandatory injunction to require him to tear it down in so far as it violates the covenant, without regard to the hardship of the case: *Manners v. Johnson*, 1 Ch. Div. 673. And such also was the relief adjudged in *Hall v. Weester*, 7 Mo. App. 56.

The covenants in deeds usually run to the covenantee, "his heirs and assigns." Suppose, then, that the covenantee conveys some of the land and retains some of it. The covenant runs with the parcel conveyed, and passes to that "assign," so as to give him a right to file a bill in equity for an injunction against its violation: *Manners v. Johnson*, 1 Ch. Div. 673, 681. It also continues to inure to the benefit of the original covenantee, in respect of so much of the land as he retains: *Manners v. Johnson*, 1 Ch. Div. 673, 681. It follows that, under the practice in chancery where parties having a common though not a joint interest are allowed to join in the bill, both the original covenantee and his assign may join in the bill for such an injunction: *Manners v. Johnson*, 1 Ch. Div. 673, 681. But as the interest of the respective lot-owners is common, and not joint, and may be even different in degree, so that some may be willing to assist in defraying the expense of the litigation to vindicate their rights under it, while others may not, it is not necessary that all owners having a right to the same redress should join as plaintiffs in the action, or that failing to do so, they should be made defendants: *Western v. McDermot*, L. R. 1 Eq. 498; affirmed, L. R. 2 Ch. 72.

An adequate insight into this subject cannot be obtained without a careful examination of several illustrative cases in which relief was granted and refused. In one such case, A, the owner of a large tract of land, conveyed a triangular portion of it to B, who owned the next adjoining lot beyond, with the reservation in the deed, "that no building is to be erected by the said B, his heirs or assigns, upon the land herein conveyed." A retained the rest of the lot as his homestead, and owned no other land in the vicinity. He afterwards sold the homestead lot to C, by a deed describing the land by metes and bounds, but making no mention of the reservation in the deed to B, or

of privileges and appurtenances. B afterwards sold to D, by a deed making no reference to the reservation, and D had no knowledge of it. All the deeds were duly recorded. It was held that it was to be inferred that A and B intended to create an easement in the granted land for the benefit of the adjoining estate of A; that this easement passed as appurtenant to the land by the conveyance of C; and that he could maintain a suit in equity to prevent D from building on his land, though the proposed building would do no appreciable injury to the land of C: *Pect v. Conway*, 119 Mass. 548. In giving the opinion of the court, Morton, J., said: 'In this case the triangular piece of land affected by the easement was a part of a large lot owned by Ensign [A]. He retained the remainder of the large lot for his homestead. There is no suggestion that he had other land in the vicinity which could be benefited by the restriction. It is difficult to see how he would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect. This is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is, that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign, but was an easement appurtenant to the estate which he conveyed to the plaintiff': *Pect v. Conway*, 119 Mass. 548; citing *Dennis v. Wilson*, 107 Mass. 591; *Stearns v. Mullen*, 4 Gray, 151. It should seem that this case might well have been decided the other way, on the ground that the enforcement of a covenant not to build at all, where to build would cause no appreciable injury to the adjoining lot, would be unreasonable. But the court disposed of this question in this way: "Nor can the fact found by the master, that the erection of the building contemplated by the defendants 'would be no appreciable damage or injury to the plaintiff's premises,' affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived because in the judgment of others it is of little or no damage": *Pect v. Conway*, 119 Mass. 548. In *Green v. Creighton*, 7 R. L. 1, 9, several tenants in common of a tract of land laid it off, and by a deed dedicated a strip of land to be used as a highway, so that their lots should front upon both sides thereof. In their deed by which they made this dedication, they inserted the following covenant: "It is hereby expressly understood, covenanted, and agreed by the grantors, for themselves and their heirs and assigns respectively forever, that no building of any description shall, at any time hereafter, be erected, placed, or put within eight feet of Halsey Street, on either side thereof." This covenant was construed "as a grant in fee to each of a negative easement in the land of all, and, as such, capable, upon the disturbance of the easement, of being enforced by the proper remedies at law and in equity." In *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713, there was a provision in the deed that the covenants should be void if there should be at any time erected certain offensive establishments on the land conveyed. The lot conveyed was one of thirty-nine building lots into which the grantor had subdivided a larger tract. All of the lots which he had sold out of this tract were conveyed by deeds containing the same covenant. It was held by Chancellor Walworth (affirming Vice-Chancellor McCoun) that the covenant of each of these deeds was intended for the benefit of the other lots, and to en-

hance their value; and that although the previous purchaser of one of the lots from the original owner could not sue at law a subsequent purchaser whose deed contained this covenant, yet equity would, at the suit of a previous purchaser, restrain the prior purchaser from violating the covenant. So an agreement between a vendor and a vendee, in a conveyance of land, "that any distance which may remain westwardly to J Street shall never be hereafter sold, but left for the common benefit of both parties and their successors," has been held to create an equity on the successor of the estate of the vendor; so that a person who had acquired the estate from the original vendee was entitled to come into a court of equity to obtain the removal of a structure placed upon the land: *McLean v. McCay*, 21 Week. Rep. 798. On the sale of a number of contiguous lots, the grantor and grantees covenanted with each other that all the lots should be subject to a restriction that "no building shall be built upon either of the several lots of ground, to be used for purposes other than and as for a private dwelling-house, private or necessary house, coach-house, or stable." It was held that this covenant ran with the land and bound the successors of the parties, and that equity would enforce it by restraining its breach, unless some good ground be shown to the contrary. And the court accordingly restrained the building of a church upon one of the lots: *St. Andrew's Church Appeal*, 67 Pa. St. 512.

In a case where this principle was declared and applied, it appeared that D., being the owner of several parcels of land, which were described upon a plan which had been recorded in the registry of deeds, conveyed to the defendant in fee-simple a certain parcel numbered 3 on the plan, with the building thereon, by metes and bounds, and "subject to the following restriction: that no out-buildings or shed shall ever be erected westwardly of the main building of a greater height than those now standing thereon," and that thereafter D. conveyed the parcel or lot numbered 4 on the plan to R., with all the rights, easements, privileges, and appurtenances thereunto belonging, which afterwards came by mesne conveyances to the plaintiff. It was held that the plaintiff was not entitled to the aid of equity to enforce against the defendant the restriction contained in the deed of D. to the defendant. The court, speaking through Bigelow, C. J., said: "The infirmity of the plaintiff's case is, that there is nothing from which the court can infer that the restriction in the deed from Downing [from D. to the defendant] was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney v. Union R'y Co.*, 11 Gray, 359, 71 Am. Dec. 715, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a remedy in equity. But there is an entire absence of any language in the deeds under which the parties claimed from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to inure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed; nor is there any language in the deeds under which the plaintiffs claim title which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate.

Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance, or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it may have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that conveyed to the plaintiff originally formed a part": *Badger v. Boardman*, 16 Gray, 559.

In another such case it appeared that in 1834 the plaintiff conveyed to one Nudd a certain parcel of land, upon condition "that the grantee, nor his heirs or assigns, will not at any time build, or permit to be built, any building upon said lot, nearer to either of said streets [the boundary streets] than eight feet," etc. Afterwards this parcel was divided into three lots, each fronting on Auburn Street. Long afterwards, Mrs. Niles became owner by means conveyances of one of these lots, by a deed of release which contained the proviso "that no building shall ever be erected or suffered to stand upon the afore-described piece of land, or any parcel thereof, contrary to the provisions of said condition; but a breach of this prohibition shall in no case work a forfeiture, but shall be conclusively deemed a nuisance, for which I, my heirs or devisees, shall be entitled to enter and abate without process of law, and shall likewise be entitled to damages against the party or parties offending, but against no others, and also to any and all other remedies at law or in equity." This deed was recorded. Still later, Whitney became possessed by means conveyances of another of the three lots, and conveyed it to the defendant. At the time of the conveyance to Mrs. Niles, the then owner of the defendant's lot did not know of the first deed above spoken of, and neither he nor any of those succeeding him in the ownership of the lot had ever consented thereto. It was held that the plaintiff, the original covenantee, could not maintain a suit in equity to restrain the defendant from building on his lot within eight feet of Auburn Street. In giving the opinion of the court, Mr. Justice Gray said: "There is nothing in the case to show that the restriction in the deed from the plaintiff to Nudd was part of a general plan for the benefit of the land thereby granted, and other estates on the same street, or was inserted in the plaintiff's deed for the benefit of the grantee or his assigns, or was repeated in any grant or covenant executed by him or them, or either of them. Under these circumstances, a purchaser from Nudd of part of the land so granted to him has no more right in equity than at law to enforce the restriction against the purchaser of another lot of the same land": *Dana v. Wentworth*, 111 Mass. 291, 293. The court cite *Jewell v. Lee*, 14 Allen, 145; 92 Am. Dec. 744; *Kent v. Lyon*, L. R. 4 Ch. 218. They also say: "The judgment of the chancellor of New Jersey, in *Winfield v. Henning*, 21 N. J. Eq. 188, is inconsistent with the decisions in this commonwealth and in England."

In another case, it appeared that the owner of land lying on both sides of a street granted the portion on one side which bordered upon the ocean, subject to the condition that the same should be used only for bathing and boating from the beach, and that only low bathing-houses should be built thereon. It did not appear that he then intended that the land so granted should be subsequently divided, and held by different owners. This, how-

ever, was done, and deeds of conveyance were made subject to the condition. The purchaser of one end of the land also purchased from a stranger a lot opposite thereto, on the other side of the street. It was held that such purchaser could not maintain a bill in equity against the purchaser of another portion of the land to restrain the latter from violating the condition. The court proceeded upon the view stated in the preceding paragraph; and in the course of its opinion, given by Bigelow, C. J., it also said: "There is nothing in the case before us which in any degree tends to show that there was any intent on the part of the grantor or grantees in the original deed by which the condition was annexed to that grant that the land now owned by the parties to this suit to give any other or different effect to the condition than that which would result from it at common law. It does not appear that the original grantor had in contemplation the division of the land into separate lots or parcels which would be held by different owners, or that the condition was inserted in the grant for the purpose of creating a restriction on the use of the land as between subsequent grantees of different lots or parcels thereof. And this constitutes the precise distinction between the case at bar and that of *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632, on which the plaintiff mainly relies in support of his case. There it was made to appear that a condition annexed to a grant of an estate was imposed in order to render the occupation of adjacent estates more convenient and advantageous, and that the existence of such condition entered into and formed part of the consideration of the grant of estates which were intended to be benefited thereby. So far as we are able to see, there is nothing to indicate that the original grantor of the premises, in annexing the condition, had any intent to regulate or control the possession or enjoyment of the premises for the benefit of subsequent owners or grantees of the estate, or any part of it, but that it was imposed by him solely for his own private and personal benefit, as the owner of other lots in the vicinity, in which the present plaintiff has no interest whatever": *Jewell v. Lee*, 14 Allen, 145, 150; 92 Am. Dec. 744.

In another case in Massachusetts, J. S., the owner of a tract of land, laid it out in lots, and recorded in the registry of deeds a plan, showing the streets and lots, with their dimensions. On the north side of one of the streets were five lots, numbered consecutively from 6 to 10, and on the south side a large lot. J. S. conveyed this large lot without restriction, and built a house on lot 10, standing twenty feet back from the street. He then conveyed lot 8 and part of lot 7 to the plaintiff's grantor, by deeds containing a provision that for fifteen years no building should be placed on the granted premises within twenty feet of the street, and that no trade offensive to dwelling-houses in that neighborhood should be carried on, and that a violation of either of these restrictions should not work a forfeiture, but that J. S., his heirs or devisees, might enter upon the land and remove anything violating the restrictions. J. S. afterwards conveyed the rest of lot 7 and also lot 6 to the defendant, by deeds containing the same provision. The court held that the plaintiff could not maintain a bill in equity to restrain the defendant from erecting a building on lot 6 within twenty feet of the street. It was not claimed that in regard to any of the lots there was any written covenant by the grantor, and it did not appear that there was any express stipulation or direct assurance on his part that any person who should purchase a lot on the north side of the street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling-houses and the street. The court, speaking

through Ames, J., said: "The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact that in his transactions with two separate and independent purchasers the grantor conveyed a portion of the land in each case subject to the terms and conditions set forth in the bill of complaint. It is true that of these conditions the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery-stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling-house in that immediate neighborhood, and a provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house. It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as an inducement to the purchase to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee. But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees, may enforce it. Neither of the deeds under which these parties respectively claim purports to give to the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling-house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained": *Sharp v. Ropes*, 110 Mass. 381, 385.

Another illustration of the foregoing principle is found in a case decided by Vice-Chancellor Shadwell in 1839, where a deed dated in 1827, made between J. Pitt, of the one part, and the other persons who had executed the deed, of the other part, recited that Pitt, being seised in fee of the lands delineated in the plan annexed (being a plan of a town called Pittville), and having in contemplation to establish a spa at or near the north end of the lands, and to erect a pump-room at or near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure-grounds, roads, etc., had caused the plan to be drawn, whereby the mode in which the lands were intended to be laid out, and the purposes for which they were intended to be converted and used, were described, in order that the beauty and regularity of the whole design might be forever thereafter preserved, subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design, and that each of the other parties to the deed had purchased, or agreed to purchase, one or more of the pieces of land described in the plan, as set out for building. The deed then contained covenants by Pitt, his heirs and assigns, to build the pleasure-grounds, roads, etc., and to keep them in repair, and

other covenants prescribing the manner in which the pleasure-grounds, roads, etc., should be enjoyed and used by the occupiers of the houses to be erected on the building-ground, and that Pitt, his heirs or assigns, would, in every agreement which should be entered into by him or them for the sale of any part of the said ground, require the purchaser to covenant with him, his heirs and assigns, not to erect any messuage on any part of the ground which might lessen in value any other of the messuages erected or to be erected at Pittville. Thereafter, in 1833, Pitt agreed to sell lots 2, 3, 4, and 5 of the building-ground to Stokes, and Stokes agreed with Pitt to erect three houses on those lots, and agreed with him that each house should stand back twenty-five feet from the western boundary of the lots, and that he (Stokes), his heirs or assigns, would not do or suffer to be done on the lots, or in any building to be erected thereon, any act, deed, etc., which might be deemed a nuisance, injury, or annoyance, or which might lessen in value any adjoining or neighboring lands or property, or any houses to be erected thereon. Stokes built two houses on lots 2 and 3, and in 1833 Pitt conveyed these lots to him, and Stokes, for himself, his heirs and assigns, entered into a covenant with Pitt, his heirs and assigns, with respect to these lots and the houses thereon, similar to the last-mentioned stipulation in the agreement. Stokes subsequently gave up to Pitt lots 4 and 5, of which he had the contract of purchase, as already stated, and abandoned his contract of purchase as to them, and then sold his house on lot 3 to the plaintiff. Pitt afterwards agreed to sell lots 4 and 5 to Creed. The agreement between Pitt and Creed stipulated that the house to be erected on those lots should stand back, not twenty-five but ten feet at least from the western boundary thereof, and it also contained a stipulation for protecting the adjoining property from injury, etc., similar to that in the agreement with Stokes. Both Stokes and Creed executed the deed of 1827. Creed began to build a house on his lots thirteen feet distant from the western boundary, which was twelve feet in advance of the plaintiff's house, and which the plaintiff alleged would be a nuisance or an annoyance to him, and would lessen the value of his house, and consequently would be a violation of the covenant in the deed of 1827, and of the agreement of 1833. The vice-chancellor held that the plan annexed to the deed of 1827 was merely a general plan, and was not intended to be strictly adhered to, but that its details might be varied by Pitt, and, with his sanction, by the purchasers from him, and that the plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827 or of the agreement of 1833 for the purpose of preventing the completion of Creed's house in the manner intended, or the performance by Pitt of the agreement with Creed. The foregoing statement is transcribed from the *syllabus* of the case. The report of the case, and also the opinion of the vice-chancellor, are long and tedious. The vice-chancellor placed his judgment substantially on the ground that in the agreement of 1833 the purchaser, Stokes, was not covenanting as to the mode of using lots 2 and 3 so as to affect lots 4 and 5, or as to the mode of using lots 4 and 5 so as to affect lots 2 and 3. He said: "If he was the purchaser of the whole, it would be absurd to say that he should be restricted in the use of a part, so as not to injure the remainder; for, being the owner of the whole, he would not, of course, use one part so as to injure the remainder. In my opinion, therefore, no part of this covenant in the agreement of April, 1833, is capable of being made to bear on the question." Secondly, he took the view that Stokes having failed to carry out his agreement of purchase as to lots 4 and 5, which Pitt afterwards sold to the defendant Creed, the covenants of 1833 in respect of those lots lapsed,

and fell back into the hands of Creed, and the case became exactly as though such covenants had never been entered into; and thirdly, that inasmuch as the plaintiff could claim only under Stokes, and as Stokes had not taken any stipulation from Pitt for enforcing against Pitt the stipulation which Pitt might have enforced against Stokes, the whole matter was left at large: *Schreiber v. Creed*, 10 Sim. 9.

A case was decided in the English court of appeal in 1876 on the following state of facts: The owner of an estate granted a lease of a plat of ground to A, who covenanted that he, his executors, administrators, and assigns, would not, during the term, do on the premises anything which should be an annoyance to the neighborhood or to the lessor or his tenants, or which should diminish the value of the adjoining property, and that he would not build, or allow to be built, on the ground any building or erection, without first submitting the plans to the lessor and obtaining his approval. Some years later, the landlord granted a lease of an adjoining plat to B, who entered into a similar restrictive covenant. Within twenty years, A commenced, with the approval of the lessor, to build upon his ground, so as to darken the windows of B's house. B thereupon brought the present bill in equity to restrain A from erecting, and also to restrain the lessor from approving, the building which A was about to erect. The court held that B was not entitled to relief, either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A's lease inured to the benefit of B. In giving his judgment, James, L. J., said: "The defendants, the Crystal Palace Hotel Company, are owners of a property under the demise of a term of years, and are erecting on it a building which may lawfully be erected, unless they have put themselves under an obligation not to do so. The plaintiff is the owner of an adjoining property under another demise for a term of years from the same lessors, of later date than that of the defendants. He therefore cannot have acquired any rights against them, except under some grant which could lawfully be made. Now, the lessors could not grant anything so as to derogate from the rights of their prior grantees. The respondent therefore was obliged to rest his case on the covenants entered into by the defendant's predecessor entitled with the grantor; and the question is, whether those covenants bring the case within the rule which says that the owner of two tenements who grants one of them cannot derogate from his own grant by anything he does on the property which he reserves, the property granted becoming entitled to easements known as easements derived by the disposition of the owner of two tenements. The plaintiff contends that though the grantor, when he made the grant under which plaintiff claims, had ceased to be the owner of the defendant's tenement, he had a right which he could have used in such a way as to prevent the plaintiff's enjoyment of his property being interfered with in any way in which the grantor would not have been allowed to interfere with it if he had retained the defendant's property, and that this interest brings the case within the rule as to the owner of two tenements. It would be a novel extension of that doctrine to hold that not only the grantor cannot do anything to derogate from his own grant, but that he is obliged to take active steps to prevent other persons from doing what he might not himself do. It cannot, in my opinion, be said that a right under a covenant is properly within the meaning of this rule. Then the plaintiff says: 'You, my lessor, could, under the covenants entered into with you by your other lessee, have prevented this erection; you had and have that right; you have granted me a piece of ground with a house on it, and you ought to enforce those

covenants for my benefit.' Now, when the plaintiff took his lease he had no knowledge of the nature of the title in the adjoining property; all he knew was, that the piece of property adjoining his had once been part of the same estate; he knew nothing of the covenant; the grant to him contains no notice of it; and it would be strange to say that a man who has taken a covenant for his own benefit can be prevented from dealing with it for his own benefit because he has granted parcels of land to other people. The covenant is not mentioned in the plaintiff's lease, and it cannot have been the intention of the parties thus to restrict the use of a covenant which was entered into, not for the benefit of the owner of the estate, that he might be able to make the most of it. It would be too great an extension of the doctrine of implied obligation to raise by implication a right in the nature of an equitable assignment of the benefit of the covenant. There was no bargain as to enforcing the covenant for the benefit of the plaintiff, and we cannot imply one": *Master v. Hansard*, 4 Ch. Div. 718. The other lords justices concurred, in separate opinions.

JEPSON v. KILLIAN.

[181 MASSACHUSETTS, 508.]

DECEASED CONTRACTOR — RIGHT TO SHARE IN PROFITS. — If several persons secure and enter into a contract for the doing of work, and commence its performance, and then one of them dies, and the others perform the contract, they must account to the representatives of their deceased fellow-contractor for his share of the profits.

J. H. Butler, for the defendants.

H. E. Ware, for the plaintiff.

HOLMES, J. This is a bill in equity for an account, brought by the administrator of one Putterill, seeking to recover a share of the profits arising from the performance of a contract by which the deceased and the defendants undertook to put in a brick conduit and to make certain excavations for the Boston Heating Company. The answer admits the contract, and the master finds that the deceased rendered some services in securing and in performing it. But he died very shortly after it was made, and the defendants went on and did nearly all the work without his aid.

The main contention of the defendants is, that Putterill's death put an end to his interest in the contract, and that his administrator is not entitled to any part of the profits. But nothing appears in the pleadings or in the master's report to take the contract with the heating company out of the general rule that the survivors must account with the representative of their deceased fellow-contractor for his interest. It does

not appear that even as between the deceased and the heating company his estate did not remain liable for the performance of the contract. But whether it did or not, it was liable, so far as appears, to make good its share of any loss to the defendants, and was entitled to share in any gain: *Schenkl v. Dana*, 118 Mass. 236; *King v. Leighton*, 100 N. Y. 386, 393, 394; *McClean v. Kennard*, L. R. 9 Ch. 336; *Newell v. Humphrey*, 37 Vt. 265, 270. See *Freeman v. Freeman*, 136 Mass. 260; 142 Mass. 98.

However the value of Putterill's interest would have been ascertained had the question arisen before performance, there is no doubt that, as the defendants have gone on and have performed the contract, his estate has a right to share the profits realized. The master's ruling to that effect is correct, and the defendant's exceptions thereto must be overruled: *McClean v. Kennard*, L. R. 9 Ch. 336; *King v. Leighton*, 100 N. Y. 386.

The report opens no other question. The master finds that Putterill's death made it necessary to employ the plaintiff in his private capacity, and has deducted the cost of his service from Putterill's share. This appears to be proper, and is not excepted to. The master makes no further allowance to the defendants, and there is nothing to show, as matter of law, that he ought to do so: See *Schenkl v. Dana*, 118 Mass. 236, 239; *Robinson v. Simmons*, 146 Mass. 167, 177.

Exceptions overruled.

Decree for the plaintiff.

SURVIVORSHIP OF ACTIONS. — As to what actions survive, see extended note to *Boor v. Lowrey*, 53 Am. Rep. 525-539; note to *Sucong v. Vaiden*, 30 Am. Rep. 55-56.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

FLAHERTY v. MORAN.

[31 MICHIGAN, 52.]

NUISANCE. — HIGH FENCE ERECTED FOR SPITE, and with malice, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance.

E. L. Carroll, for the appellant.

Thompson and Temple, for the respondent.

LONG, J. The parties to this cause own adjoining lots in the city of Grand Rapids, complainant's lot being on the northwest corner of Goodrich and Lagrave streets, and the defendant's lot adjoining it on the north, both extending westerly to an alley in the rear. The line of the lots was established before either of the parties purchased. The defendant built a house some years ago near the north line of his lot, and standing back some distance from the street. He occupies this property as his home.

In August, 1888, the complainant commenced the erection of a house on the front end of his lot. It was to be a double house, facing Lagrave Street, and the north wall being laid about four feet from the line between the two lots; the front wall being much nearer Lagrave Street than defendant's house. After the foundation wall was laid, the defendant built a screen or board fence, about ten feet in height, along the line of the lots, but upon his own premises, extending from the front wall of the complainant's house backward the whole length of complainant's house.

It is claimed by the complainant that the screen or fence was built maliciously, and for the purpose of darkening his (com-

plainant's) rooms, and for no useful purpose. The bill is filed to compel the defendant to remove such fence. On the hearing in the court below, the court decreed such removal within sixty days from the decree, and perpetually enjoined the defendant from building or maintaining such a screen or fence. From this decree defendant appeals.

The testimony was taken in open court, and there seems but little dispute of fact, except as to the motive which induced the defendant to build such a fence. It appears that while the complainant was building his house, and during the time the foundation wall was being placed, the wife of the defendant came up and saw Mrs. Flaherty near there, and inquired if the complainant's house was to stand so near the street; and being advised that it was, she remarked that it would spoil the looks of their place and shut off their south view, and if it was so built, she would build a board fence between them twelve feet high. Soon after this talk, the fence was built. Posts were put in the ground, stringers put across, and the boards, extending up and down, were nailed on these stringers, on the defendant's side, the side towards complainant's house being rough and unplanned. This fence stands within about four feet of complainant's house, and as the proofs show, darkens his rooms, and obstructs the light and air. The defendant claims not to have known much about the erection of the fence; but it is shown that he brought the posts there, and paid the bill presented for its construction, though his wife looked generally to the height and character of the fence while it was being built.

It is not profitable to recite the evidence given on the hearing. The only excuse made by the defense for its erection comes from the wife of the defendant, who testifies that, while the walls of the complainant's house were being erected, she met Mrs. Flaherty on the corner of the lawn, and inquired if the house was to come so near the street as that, and being told that it was, she responded to Mrs. Flaherty: "Don't you know that you are going to injure the property on the street, and injure ourselves, entirely?"

Mrs. Flaherty said: "We are building the house for ourselves, not for other people."

Mrs. Moran said: "Very well. We will build a fence for ourselves, and we will make it twelve feet high."

Soon after this the fence was built, and has ever since been so kept and maintained. Mrs. Moran says, upon an inquiry

being made as to who maintains it: "I do, for my own benefit, — to keep the neighbors from looking through my house, and to protect my lawn. It is not pleasant to live in a house where folks can look right through it, and have another house down in front of you, that you cannot sit down by a window unless your neighbors can see you. There are times when folks want to be alone in their own house; and furthermore, I want that fence to plant vines on."

The *animus* of the whole matter is plainly discernible from the testimony of Mrs. Moran. The complainant had built his house standing somewhat nearer the street than defendant's house, so that Mrs. Moran's view was obstructed towards the south, and she thought it hurt the looks of her place. It is very evident that the fence serves no useful or needful purpose, and was built, and is now maintained, out of pure malice and spite. The case comes so squarely within the opinion of Mr. Justice Morse in *Burks v. Smith*, 69 Mich. 380, that I shall not discuss the questions of law involved. It was there held, by an equal division of the court as then constituted, that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance. I fully approve of the reasoning of Mr. Justice Morse in that case, and rest this case upon the reasons there given by him.

The decree must be affirmed, with costs.

FENCES — ACTION FOR THE MALICIOUS ERECTION OF HIGH FENCE. — In *Mahon v. Brown*, 13 Wend. 361, cited in the note to *Phelps v. Nowlen*, 28 Am. Rep. 103, the court decided that the plaintiff could not maintain an action on the case against the defendant, who had maliciously erected a high fence upon his own premises, not for any benefit to himself, but merely to annoy the plaintiff and obstruct her air and light.

In *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570, it was decided that the plaintiff, showing no prescriptive right to light and air, could not maintain an action against defendant for the erection upon his own land of a high board fence within two feet of plaintiff's house, whereby light and air were shut off from such house and the rooms therein rendered dark and unfit for habitation.

In Massachusetts, however, there is a statute which declares certain high fences, maliciously erected by one upon his own land, to be private nuisances, and provides a remedy therefor: Mass. Stats. of 1887, c. 348. And in *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, and *Smith v. Morse*, 148 Mass. 407, the provisions of such statute were held to apply to fences existing at its passage and subsequently maintained.

A somewhat analogous principle underlies the decision of the court in *Fulton v. Schilling*, 29 Kan. 202, 44 Am. Rep. 642, in which the rule is laid down that an owner of land may erect small and cheap movable tenement-houses thereon close to the line of an adjacent owner and let them to orderly colored tenants, notwithstanding his avowed purpose is to punish such adjacent

owner for refusing to sell him his land at an adequate price, and to compel him to do so. Nor can a private dwelling be declared a nuisance merely because it may injure an adjacent owner by cutting off his breeze from and his view of the sea: *Quintini v. Board of Aldermen*, 64 Miss. 483; 60 Am. Rep. 62. Compare note to *Pheps v. Nowlen*, 28 Am. Rep. 101-108, as to actions against the owner of land for lawful acts done maliciously upon his own premises.

MILLER v. OTTAWAY.

[81 MICHIGAN, 196.]

NEGOTIABLE INSTRUMENTS—BREACH OF WARRANTY, WHEN NO DEFENSE TO A NOTE.—It is not a good defense against a *bona fide* holder for value that he was informed that the note was made in consideration of an executory contract of warranty, unless he was also informed of its breach.

NEGOTIABLE INSTRUMENTS—COLLATERAL WARRANTY NO DEFENSE AGAINST PURCHASER OF NOTE BEFORE MATURITY.—A mere collateral agreement or warranty made at the time a note is given does not affect its negotiability, although the purchaser before maturity may know of such agreement.

NEGOTIABLE INSTRUMENTS—BREACH OF WARRANTY IN SALE NO DEFENSE ON NOTE.—A purchaser of mares, sold at auction under warranty that they are with foal, who gives his note in payment, which is purchased by a third person for value, in good faith and before maturity, with knowledge of the warranty, but without knowledge of its breach, cannot set up the defense of a breach of the warranty in a suit on his note.

Howard and Gold, for the appellants.

Durand and Carton, and *Ira T. Sayre*, for the respondent.

CHAMPLIN, C. J. This suit was brought to recover the amount of a promissory note dated November 15, 1887, due in one year, payable to Archibald Carmichael or bearer, for \$407.

The consideration for which the note was given was one span of mares and two colts, purchased by James Ottaway at an auction sale. Ottaway bid off the span of mares for \$285, and the colts for \$122, and gave his note for the amount. Defendants claim that at the time of sale the mares were warranted to be with foal, and if they proved to be so, then he (Ottaway, the purchaser) was to pay the further sum of sixteen dollars for the service of the horse. Plaintiff purchased the note of the payee on December 3, 1887, and paid full value for it. It turned out that the mares were not with foal. The plaintiff was present at the auction sale, and acted as clerk for Mr. Carmichael, who was confined to his house by sickness, and had general control of the auction. If the warranty

was made as claimed by the defendants, plaintiff was fully aware of it at the time. No question is made that the mares were not served with the horse in the proper season. Defendants claim to have become satisfied that the mares were not with foal in the spring or summer following. The plaintiff denied that the sale was with the warranty claimed by defendants.

The first question to be decided is, whether, conceding there was a warranty, it can be set up in recoupment of damages against the note in plaintiff's hand. Restating the facts for the purposes of this question, it presents a case where no fact exists which impugns the title of the holder, nor the honesty, good faith, or validity of the original transaction, of which the note was a part. There was simply a warranty on the sale that the mares were with foal, and if they proved to be so, the purchaser was to pay sixteen dollars more for the service of the horse. The purchase of the note was for full value, with a knowledge of the warranty, but without knowledge of its breach, before the note matured, and before it was known that there would be a breach. The promise of the defendants was not conditional; neither was there fraud nor imposition connected with the inception of the note. The plaintiff, having paid value before maturity, held the note by an independent title.

It was said by this court in *Nichols v. Sober*, 38 Mich. 681, that "the law has always been solicitous to exclude any rules calculated to hinder the free circulation of mercantile paper having legitimate inception, as in this case; and it is settled in this state that a transferee cannot be deprived of his right as a *bona fide* holder in this class of cases, except upon evidence sufficient to show his participation in the fraud, or equivalent misconduct of the party who transfers to him."

It is laid down in 1 Parsons on Bills and Notes, 261, that "knowledge on the part of the holder, at the time he took the note, that it was not to be paid on a specified contingency, is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of this fact"; citing *Adams v. Smith*, 35 Me. 324; *Ferdon v. Jones*, 2 E. D. Smith, 106; *Davis v. McCready*, 4 E. D. Smith, 565; see also *Kelso v. Frye*, 4 Bibb, 493; *Dow v. Tuttle*, 4 Mass. 414; 3 Am. Dec. 226; *State Nat. Bank v. Cason*, 39 La. Ann. 865; *Patten v. Gleason*, 106 Mass. 439; *Davis v. McCready*, 17 N. Y. 230;

72 Am. Dec. 461; *Craig v. Sibbett*, 15 Pa. St. 238; *Bond v. Wiltse*, 12 Wis. 611.

From the foregoing authorities, and upon reason, the correct doctrine appears to be, that it is not a good ground of defense against a *bona fide* holder for value that he was informed that the note was made in consideration of an executory contract, unless he was also informed of its breach. If he had knowledge of the breach, the defense may be interposed: *Wagner v. Diedrich*, 50 Mo. 484; *Coffman v. Wilson*, 2 Met. (Ky.) 542; *Bowman v. Van Kuren*, 29 Wis. 218; 9 Am. Rep. 554; *Sutton v. Beckwith*, 68 Mich. 303; 13 Am. St. Rep. 344.

The note in question being valid in its inception, and not subject to any condition, a collateral agreement to warrant the mares to be with foal cannot be set up as a defense to the action in this case, where the plaintiff purchased in good faith for value, and without any notice or knowledge of any breach of the warranty. A mere collateral agreement or warranty made at the time the note was given does not affect the validity or negotiability of the note, although the purchaser before maturity may know of such agreement. It is common knowledge that in many executory contracts, involving large sums of money, such as drafts drawn against bills of lading, and also such as the purchase of real estate, lumbering contracts, construction of buildings and roads, and other business dealings, notes are given, and often negotiated to those familiar with the terms of the contracts; and it would unnecessarily hamper the transfer of such paper, and affect its value injuriously, to hold that the purchaser before breach of such contract, although he had notice of the contract under which it was given, takes such paper subject to any damages that may arise to the maker from failure of the payee to perform such contract. There is neither reason nor necessity for so holding. Indeed, the defendants in this case set up in their notice of defense the warranty and its breach, and that plaintiff purchased the note with knowledge of such warranty and its breach before he so purchased.

The jury found, in answer to a special question, that the plaintiff, George Miller, bought the note in question of Archibald Carmichael before his death; and it was in proof that he died January 6, 1888. This is an end of the case. The defense is not made out, and it is immaterial if testimony tending to show a warranty by Carmichael was erroneously ruled out. Under the special finding, which has the force of

a special verdict, no other general verdict could have been rendered by the jury than the one they did.

The judgment must be affirmed.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTES — DEFENSE. — Failure of consideration as a defense to a note must be proved by him who alleges it, and he must also show that the plaintiff, who received the note before maturity, had notice of such defense at the time he received it: *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621. Defect or failure of the consideration of a note may be given in evidence against the payee, or even the indorsee with notice: *Le Blanc v. Sanglair*, 12 Mart. (La.) 402; 13 Am. Dec. 377, and note 378, 379. Where a note recites the consideration upon which it rests, an indorsee taking it before maturity is chargeable with notice of such recital. The recital is not, however, sufficient of itself to advise him that there was or necessarily would be a failure of consideration; still, if at the time of the indorsement the consideration had in fact failed, the recital might be sufficient to put him upon inquiry: *Siegel v. Chicago etc. Bank*, 131 Ill. 560; 19 Am. St. Rep. 51. Compare *Sutton v. Beckwith*, 68 Mich. 303; 13 Am. St. Rep. 344, and note; *Kulenkamp v. Graf*, 71 Mich. 675; 15 Am. St. Rep. 253, and note 257, 258.

POLLASKY v. MINCHENER.

(21 MICHIGAN, 280.)

LIBEL — PRIVILEGED COMMUNICATIONS. — In actions for libel, qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty, and embraces cases where the duty is not a legal one, but is of a moral or social character of imperfect obligation.

MERCANTILE AGENCY — PRIVILEGED COMMUNICATION. — A mercantile agency does not stand in such relation either of interest or duty with its subscribers that communications from it to them generally are privileged. Exceptions exist in relation to those persons who are interested in obtaining the particular information and to whom it is furnished upon special request. To this extent, and no further, are such communications protected by a qualified privilege.

LIBEL BY MERCANTILE AGENCY. — False publications respecting the character and financial standing of a business man, furnished by a mercantile agency to its subscribers generally, without request, is libelous, and not privileged, though made in good faith.

LIBEL BY AGENT OF MERCANTILE AGENCY. — A general agent and district business manager for a mercantile agency who furnishes, or causes to be furnished, through his chief clerk, to its subscribers generally, without request, false publications respecting the character and financial standing of a business man, is liable in an action for libel therefor, as such communications are not privileged.

Henry M. Duffield, for the appellants.

Dickinson, Thurber, and Stevenson, for the respondents.

CHAMPLIN, C. J. The plaintiffs sued Minchener and Robert G. Dun to recover damages for a libel published by the R. G. Dun & Co. Mercantile Agency, of which Minchener was the general manager of a district in Michigan, of and concerning the plaintiffs.

Max E. Pollasky and Frank E. Pollasky composed the firm of Pollasky Brothers, carrying on mercantile business at the village of Alma, Gratiot County, Michigan. They had been engaged in business at that place since 1882. They were in good credit, and had never filed or placed a chattel mortgage upon their property, and in carrying on their business bought mostly upon credit, and had established a business reputation for prompt payment of their bills.

R. G. Dun & Co. is a mercantile agency well known in the mercantile community, and have a clientage throughout the United States estimated at twenty-five thousand subscribers, and in the state of Michigan of about six hundred.

The alleged libel consists in R. G. Dun & Co. sending from their Detroit office to their subscribers what is known as a "notification-sheet," under date of February 23, 1887, which, under the head of "Items of Record," "Michigan," among other items, contained the following:—

"Alma — Pollasky Bros. Chat. mort., \$10,000. D. G., clothing, and B. & S."

This item was wholly false. R. G. Dun & Co. were non-residents, as also was Robert G. Dun, and no service of process was had upon him in this suit, and he did not appear to the action.

Minchener was general manager of a district of the Michigan business, and was located at Detroit. He was paid a salary, and a further compensation for his services, depending upon the amount of business done in Michigan. He had authority to employ clerks and to discharge them. Notification-sheets were sent direct to subscribers from the Detroit office. Reports were made to, and all letters containing information affecting the credit of tradesmen were mailed to, his address individually in Detroit. He had a chief clerk, who opened these letters and noted their contents. Minchener based his defense upon two grounds: 1. That the communication was privileged; 2. That the libel, if libel it was, was published by R. G. Dun & Co.; that he was not a member of that company, and had no proprietary interest therein, and was not responsible for its publication.

The trial court took the case from the jury, and directed a verdict for defendant, upon the ground that Minchener was not liable.

1. Was the notification-sheet, which was sent to all subscribers, a privileged communication?

In *Bacon v. Michigan Cent. R. R. Co.*, 66 Mich. 166, I discussed the subject of privilege in actions for libel, and shall not go over the ground again. I adhere to what I there said, both as to absolute and qualified privilege. There is no foundation for the claim that the libel set forth in the declaration is absolutely privileged. The question is, Do the facts of this case bring the publication within the class of communications which are qualifiedly privileged? Qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty; and embraces cases where the duty is not a legal one, but is of a moral or social character, of imperfect obligation: *Bacon v. Michigan Cent. R. R. Co.*, 66 Mich. 170, and cases cited.

The mercantile agency does not stand in such relation, either of interest or duty, with its subscribers generally, that communications from it to them generally are privileged. Exceptions exist in relation to those persons who are interested in obtaining the particular information, and to whom it is furnished upon special request. To this extent, and no further, are such communications protected by a qualified privilege.

Consider for a moment the relation of the mercantile agency to its subscribers. It undertakes to furnish them, for a consideration paid in advance, such information relative to the responsibility and credit of merchants and others as it obtains from its subagents, servants, and correspondents, without guaranteeing the accuracy, reliability, or correctness of such information, or being responsible for any loss caused by the neglect of its agents and servants, or for their want of verity. It expressly stipulates that it will not reveal to such subscribers the sources of its information, nor the names of the persons from whom it received it, and requires a pledge from the subscribers that they will never, under any circumstances, communicate to the persons reported the information received concerning them from the mercantile agency. It also adopts measures to prevent the particular communities from ascer-

taining the name or identity of the person reporting the standing of business men in that community.

The secret and inquisitorial agencies ramify every part of the United States and the Dominion of Canada, and possess the power of destroying with falsehood or calumny the credit of any business man in the country, and of bringing him to bankruptcy and ruin. To hold such vast secret inquisitions exempt from liability for false publications respecting the character and standing of a business man would be to sanction the highest injustice. The business man's integrity, his reputation for fair and honest dealing, his prosperity in the transaction of his business, are of the utmost importance to him, and are oftentimes his best capital with which to carry on his business.

Commercial credit is based upon confidence, and all know upon how frail foundation commercial confidence is builded. A breath of suspicion may destroy it. Confidence is withdrawn, and the party is ruined. And so in a broader field, a breath of suspicion is directed against the public credit, suspicion gives place to rumors of disaster, rumors disseminated undermine the general confidence, and a panic is the result. On the other hand, these same commercial agencies, which always have their fingers upon the business pulse of the country, are a most potent factor in keeping up public confidence. They issue their manifestoes of encouragement, and scatter them broadcast over the land. They are read by the business men of the country. The newspapers assist the circulation among all classes of people, and public confidence is strengthened, or, at least, fears of disaster are allayed. In this they exert a strong influence for good, and are recognized institutions in carrying on the business of the country. But they are also potent for evil to the individual. They send out their notification-sheets containing a false statement respecting a particular person, and he is undone, — no one will trust him, and all claims are pressed for immediate payment. His business character is sullied, confidence is withdrawn, and his business career has received a blow which it will require a long time to repair.

The notification-sheet containing the false statement respecting the acts of Pollasky Brothers was not alone sent to those who were dealing with them and extending them credit, but to between six and seven hundred subscribers in Michigan, and others residing out of the state, from some of whom they might wish

to purchase goods upon credit, and this without any request being made to be informed of the standing or credit of Pollasky Brothers; and others of whom, and by far the greater number, were engaged in different lines of business, and were in no manner interested in knowing their standing, or financial ability or business integrity. To all such the communication was not privileged. It cannot be said that a blacksmith, a saw-mill and lumber dealer, a furniture manufacturer, a dealer in hardware, a chemist, mineral-water bottlers, butchers, book-agents, physicians, or druggists, or those in other business mentioned in the notification-sheets who are not engaged in the wholesale or retail dealing in dry-goods, clothing, or boots and shoes, are at all interested in the business standing of a dealer in dry-goods, clothing, and boots and shoes.

No court has gone so far as to hold that all communications made by a mercantile agency to its subscribers, if made in good faith, but made generally, without request, or to those not inquiring concerning or interested in knowing the condition and financial standing of a person, are privileged. On the contrary, courts have uniformly held that privilege does not extend to false publications made to patrons who have no such interest in the subject-matter: *Goldstein v. Foss*, 2 Car. & P. 252; 12 Eng. Com. L. 556; *Commonwealth v. Stacey*, 8 Phila. 617; *Taylor v. Church*, 8 N. Y. 452; *Ormsby v. Douglass*, 37 N. Y. 477; *Sunderlin v. Bradstreet*, 46 N. Y. 188; 7 Am. Rep. 322; *King v. Patterson*, 49 N. J. L. 417; 60 Am. Rep. 622; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77; *Erber v. Dun & Co.*, 12 Fed. Rep. 526; and see 26 Am. Law Reg., N. S., 681, and 28 Am. Law Reg., N. S., 259.

It was strongly urged upon us at the hearing that we should adopt the able opinion of Van Syckel, J., in which he dissents from the majority of the court in *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, in which he goes the whole extent of giving immunity to commercial agencies for all publications made in good faith to their subscribers, whether true or false. In his desire to keep abreast of the progressive state of society, and the new and varying conditions that may arise in the progress of the age, he has entirely overlooked the rights of the individual, forgetting that "society is organized and courts established for the protection of the rights of individuals."

It is all very well to advance the interests of the wholesale dealers as a class, and afford them information which will reasonably protect them from loss. But there is no principle of justice or of law which requires this to be done at the expense of the individual. It would be a harsh and tyrannical rule that would protect one person from loss at the pecuniary ruin of another. The welfare of society does not require that a few great wholesale dealers shall thrive by the sacrifice of many, or of any, small purchasers.

The code of Georgia defines "privilege" very much the same as it signifies at common law. Section 2980 declares as privileged communications,—"1. Statements made *bona fide*, in the performance of a public duty; 2. Similar statements in the performance of a private duty, either legal or moral."

In *Johnson v. Bradstreet Co.*, 77 Ga. 172, 4 Am. St. Rep. 77, the commercial agency sought to justify a false charge made against the plaintiff under the plea of privilege. After showing that the false charge was not made in the performance of a public duty, Jackson, C. J., said (page 175): "If one makes it his business to pry into the affairs of another in order to coin money for his investigations and information, he must see to it that he communicate nothing that is false."

And he held that the communication made under a contract similar to the one introduced in evidence in this case was not the result of a private duty, either moral or legal, in the sense of the statute, and was not privileged.

If we should advert to the circumstances of the publication of this libel, we could point out circumstances from which a jury might infer express malice. The information was obtained from Mr. Balke, an attorney at Alma, where Pollasky Brothers carried on business. He was the correspondent of the agency at that place. On February 20, 1887, he sent a letter by mail from Alma, addressed to George H. Minchener, Detroit, in which he stated: "I write to inform you that there has been a chattel mortgage of ten thousand dollars filed in this township upon the stock of dry-goods and clothing, boots and shoes, of Pollasky Brothers, running to Citizens' National Bank, Detroit. Think it is the forerunner of a failure. Would advise caution in dealing with them."

This was received at the Detroit office of Dun & Co. on the 21st, and the letter was opened by the chief clerk, Thomas, who knew that there was no Citizens' National Bank in Detroit. He knew that the information was not correct in that particu-

lar. Notwithstanding, he took this letter, and directed a type-writer to make a report to send out in proper form, as follows: "Pollasky Brothers, dry-goods, clothing, boots and shoes, Alma, Gratiot County, Michigan. — A chattel mortgage of ten thousand dollars has been filed in this township, covering their stock of dry-goods and boots and shoes, running to Citizens' National Bank, Detroit. It is thought that this may be the forerunner of a failure. Would advise caution in dealing with them, and *prompt action on the part of creditors.*"

The words in *Italics* were added in the Detroit office, and were very pernicious in their effect upon Pollasky Brothers; for they not only found their credit ruined, but their creditors took prompt action in presenting claims that were not due, as well as those that were. R. G. Dun & Co., at Detroit, advised Balke that there must be some mistake, as there was no such bank in Detroit, and requested him to investigate further, and report, and instead of waiting for the result of such investigation, sent out the notification-sheet uncorrected, and containing the wholly false statement, on February 23d. It would seem that plenty of time had elapsed, where daily mails and telegraphic wires connect the two points, to ascertain the truth of the report.

2. Is George H. Minchener liable for the publication of this libel? The attorney for the plaintiffs insists that the facts in the case directly connect the defendant Minchener with the publication, and establish an implied consent to and authorization of the publication of the libel complained of. He claims that "the evidence was uncontradicted that the information contained in the item in the notification-sheet concerning plaintiffs was sent to the office of the defendant Minchener in Detroit, in a letter by one Balke, an attorney at Alma, Michigan. It is addressed to 'George H. Minchener, Detroit, Michigan,' not to 'R. G. Dun & Co.,' or to 'George H. Minchener, agent R. G. Dun & Co.,' but to 'George H. Minchener,' personally and individually. There is not a line or word in the letter to indicate that it was intended for R. G. Dun & Co. The defendant swears he did not receive it, but found it in the office of R. G. Dun & Co., of which he was manager, and when he found it, that it was opened. And in explanation of this, he says that stamped envelopes are furnished to the attorneys of the agency, in which to reply to inquiries, and that those envelopes, for the Detroit office, and sent out therefrom, were addressed 'George

H. Minchener'; and he leaves it to be inferred that this letter came in one of these envelopes, and was opened by his chief clerk, Charles F. Thomas, who prepared the notification sheet from it, and also sent out the notices to the other offices of R. G. Dun & Co. Minchener testifies that all letters in envelopes with the printed address, 'George H. Minchener, Detroit, Michigan,' would go into his chief clerk's hands, whose duty it would be to open it, and unless there was something exceptional in connection with the matter, Minchener's attention would not be called to it."

And he contends that "if we believe Minchener's testimony, the case therefore stands thus: Minchener authorizes Thomas to open all letters addressed to him, and to incorporate in the notification-sheets whatever items of news he finds in such letters, without consulting him, 'unless there was something exceptional in connection with the matter.' Thomas, acting under this authority, receives the Balke letter, prepares the notification-sheet from the information therein, and sends out this false and wicked libel broadcast all over the United States. When sued for the serious damage which the libel has caused the plaintiffs, he replies: 'I knew nothing whatever about it. You must sue Thomas, my chief clerk, or R. G. Dun & Co., my principal, but you can't sue me because of anything my chief clerk did.'"

The plaintiffs' counsel also contends that the principles of *respondent superior* do not apply in cases for libel; that the proposition is general and elementary that "every one who requests, procures, or commands another to publish a libel is answerable as though he published it himself. And such request need not be express, but may be inferred from the defendant's conduct"; citing Odgers on Libel and Slander, 155.

The same work, at page 359, lays it down as the law that "if any agent or servant be in any way concerned in writing, printing, publishing, or selling a libel, he will be both civilly and criminally liable. If a clerk or servant copy a libel, and deliver the copy he has made to a third person, he will be liable as a publisher. That his master or employer ordered him to do so will be no defense."

It is not necessary to go to the full extent of the text to hold an agent liable severally or jointly with the principal.

"In general," says Mr. Justice Cooley, "all persons in any manner instrumental in making or procuring to be made the defamatory publication are jointly and severally responsible

therefor. Therefore one in the course of whose business a libel is published by his agent may be joined with an agent in an action for the publication": Cooley on Torts, 194.

There was testimony in the case sufficient to be submitted to the jury upon the question whether Minchener published, or caused to be published, the publication alleged to be libelous, and the court erred in taking the case from them.

The judgment must be reversed, and a new trial granted.

LIBEL.—PRIVILEGED COMMUNICATIONS.—COMMERCIAL AGENCIES.—General publications purporting to disclose the business standing of men, and which are circulated among all the patrons of the publisher, are not privileged communications; but a commercial agency may impart such information to any particular patron who has a particular interest in the affairs of the person whose business standing is given: Note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 348, 349; *Lowry v. Vedder*, 40 Minn. 475; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768.

PEOPLE v. GORDON.

— [11 MICHIGAN, 306.]

MUNICIPAL CORPORATIONS.—ORDINANCE REGULATING REMOVAL OF GARBAGE.—Under a statute authorizing a city council to provide by ordinance for the manner of removal of garbage from a city, and to impose and enforce appropriate penalties, an ordinance requiring the garbage to be removed through and out of the city in closed, water-tight carts or wagons, marked "Garbage," is reasonable and valid.

Edwin F. Conely, for the appellant.

John W. McGrath, Charles W. Casgrain, and Charles S. McDonald, for the people.

MORSE, J. The defendant was convicted, under an ordinance of the city of Detroit, for "unlawfully and willfully engaging in collecting and removing, in an open wagon, of garbage within the city of Detroit, . . . not being authorized so to do by permit from the health-officer of the city."

It is contended in his behalf that this conviction is illegal and unwarranted, because the ordinance is unreasonable, partial, and unequal in its operation, and was adopted for the purpose of creating, and does create, a monopoly. The ordinance is as follows:—

"Sec. 1. It is hereby made the duty of the occupant or occupants of every dwelling-house or other building in the city of Detroit to provide a suitable and water-tight box or other vessel, of a convenient size to be handled by the garbage col-

lector, in which said occupant or occupants shall cause to be placed or deposited all offal, garbage, and refuse, animal and vegetable matter, of the premises. Such occupants shall keep such box or other vessel at a place on the premises most accessible to the person collecting the garbage and offal, and it shall be unlawful to put any but refuse animal and vegetable matter in the vessel used for garbage and offal.

"Sec. 2. All garbage and offal shall be collected in water-tight, closed carts; and each cart shall be purified as often as the health-officer may direct, and shall have painted thereon the word 'Garbage.'

"Sec. 3. No person shall engage or assist in collecting, removing, or disposing of garbage or offal within the city of Detroit except as provided in this ordinance, and also so authorized by a permit from the health-officer of the city; and it shall be unlawful for any person to interfere in any manner with the collection or disposal of garbage and offal by the person or persons authorized to do so.

"Sec. 4. It shall be the duty of any person contracting with the city for the collection or disposal of garbage to comply with the ordinances of the city, and also with such order and regulations as may be made by the board of health. Such contractor shall remove and dispose of all dead animals found within the city limits.

"Sec. 5. No person except the city contractor or his agents shall carry, convey, or transport any garbage through the streets, alleys, or public places of the city, except upon permission of the board of health; and that the common council have power, from time to time, to designate the hours during which the collection of garbage may be conducted."

Section 6 subjects offenders to punishment by fine not exceeding twenty-five dollars, or by imprisonment in the Detroit house of correction not to exceed ten days.

The charter of the city of Detroit as amended by the Local Acts of 1889 (at page 819) empowers the common council to enact and provide, by appropriate ordinance, for the manner of collecting, transporting, conveying, and handling of garbage, and all animal and vegetable matter and refuse, in said city, and to require all persons in said city to dispose of the same in the manner provided by said common council in said ordinance for the removal and destruction thereof, and to impose and enforce appropriate penalties for any violation of said ordinance.

It is stated in the brief of respondent that this amendment was procured by a prominent citizen and ex-official of Detroit for purposes of his own private gain, and that he is now the contractor with the city for the removal of the garbage of the city, and that he has a practical monopoly of the business, out of which there is likely to come a fortune at the expense of many people who have hitherto made respectable and honest livings in the same business. Of this, however, the record gives us no hint. It is stated in the brief of the city counselor that the city has entered into a contract for the removal of this garbage and refuse matter at an expense of thirty-five thousand dollars annually. But we must look at Gordon's case as it is stated in the record, and from the record it appears that he was properly and legally convicted. We do not propose to inquire into what would be the rights of the owner of the refuse matter, or any other persons, attempting to remove offal and garbage from the premises of the owner to a place outside of the city, if such owner or other person was doing so in a wagon or vehicle in conformity with the provisions of the ordinance. That question is not involved here, and it will be soon enough to discuss it when a proper case comes before us.

The evidence shows that Gordon was taking swill from the Griswold House in a light wagon, with a tight box, but uncovered, through the streets of the city, to his farm, outside the city limits. When he was in the rear of the Griswold House, a policeman saw him, and told him it was unlawful for him to remove it in that manner, and that he should make complaint against him if he took it away, but would not if he did not take it away. Gordon replied that he had bought the stuff, and wanted to feed it to his hogs, and he should take it away, and did so. Gordon testified that he was a farmer, and his business was raising hogs; that he had contracted with the proprietor of the Griswold House for the swill of the house at six dollars per month, Gordon to take it away; that he did not know that he was violating any ordinance of the city until that day when he was notified by the policeman, — the day mentioned in the warrant. The same day he went to the health-officer, Dr. Duffield, for a permit, but it was refused him.

We think it competent for the common council to prescribe, reasonably, the manner of removing garbage and offal through and out of the city, and that the requirement that such refuse

shall be removed in water-tight, closed carts or wagons, and that the same shall be marked "Garbage," is a reasonable regulation. Gordon did not come within this regulation, and was guilty of violating the ordinance. Had he been provided with a wagon that substantially complied with section 2 of the ordinance, and had he been refused a permit by the health-officer for no other reason than that he was not the city contractor, or an agent or employee of such contractor, the interesting questions so ably discussed by counsel relative to the authority of cities to virtually grant a monopoly of garbage collection and removal, or to do the whole business through their officials or contractors, would have been legitimately before us for determination. As the case stands, we decline to consider the validity of this ordinance any further than is rendered necessary by the facts in the case. In so far as Gordon transgressed it, it must be sustained. That the vehicle of transportation of this filth should be water-tight, closed, and marked so that it will be known is, in our opinion, not only a reasonable regulation, but a judicious one, as affecting the public health.

The conviction is affirmed.

MUNICIPAL CORPORATIONS—ORDINANCES.—Municipal ordinances must be reasonable, to be valid: *Village of Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490; *People v. Armstrong*, 73 Mich. 268; 16 Am. St. Rep. 578. and note.

EDWARDS v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[81 MICHIGAN, 364.]

CARRIER OF PASSENGERS—COMPLIANCE WITH CONDITION OF EXCURSION TICKET NECESSARY TO RIGHT TO TRANSPORTATION.—A round-trip excursion ticket, sold by a railroad at less than the regular rate from one place to another, and conditioned that to be good for return passage it must be signed by the purchaser and stamped and dated by the ticket agent at the latter place, is reasonable and valid. The purchaser of such ticket is not entitled to return passage thereon until he has complied with the conditions named therein; and for a failure to so comply, he may be lawfully expelled from the train, without unnecessary force, upon a refusal to pay his fare, without an investigation on the part of the conductor to whom the ticket is presented as to his identity.

Cahill and Ostrander, for the appellant.

R. A. Montgomery, George C. Greene, O. G. Getzen-Danner, and C. E. Weaver, for the respondent.

CHAMPLIN, C. J. On September 13, 1887, Daniel Edwards purchased a ticket from defendant entitling him to transportation from Lansing to Chicago, Illinois, and return. The ticket was called the "Chicago Interstate Exposition Excursion Ticket," and was sold to Edwards at a reduced rate from that of regular passenger-tickets. It was good for going only on date of sale, and returning only to and including Monday immediately following the date of sale. It entitled the purchaser to one first-class continuous passage to Chicago, Illinois, and return, subject to the following conditions, printed upon the face of the ticket, viz.: "In consideration of the reduced rate at which this ticket is sold, it will be good for going passage only on date of sale. It is good for return passage only up to and including Monday following the date of sale, and when stamped and dated on back by ticket agent of Lake Shore and Michigan Southern railway at Chicago, and signed by me. The holder will identify himself or herself as the original purchaser of this ticket by writing his or her name, or by other means, if necessary, when required by conductor or agent. No stop-over allowed. Not transferable."

Beneath the above conditions upon the ticket are the words: "I agree to the above conditions," which was signed, by D. Edwards, purchaser, in his own handwriting. The face of the ticket contained a description of the passenger, indicated by punch-marks made by the ticket agent at Lansing opposite the characteristics printed thereon, which described Mr. Edwards as a slim, middle-aged man, with dark eyes and hair. On the back of the ticket there is printed the following: —

"In compliance with my contract with the Lake Shore and Michigan Southern Railway Company, I hereby subscribe my name as the original purchaser of this ticket.

"Dated Chicago, Illinois, —, 1887."

And there is a blank line for the signature. There are also printed directions to the agents at Lansing and Chicago to stamp in the space below. There were three coupons attached to the ticket, — one for a passage to Chicago, one for admittance to the exposition, and one for passage from Chicago to Lansing, "limited as per contract."

Edwards took passage to Chicago on September 13, 1887, and made one continuous trip. On Saturday, September 17th, he went to the depot of the Lake Shore and Michigan South-

ern Railway Company, where he arrived several minutes in advance of the time when the train he intended to take would leave. He busied himself with reading a newspaper until some of the party with whom he was announced that they must hurry up, and get upon the train. They passed through the gateway designed as the entrance to suburban trains, and climbing over the platform of cars, and crossing tracks, reached the train which they desired to take. Had they waited until admitted through the proper gate to take this train, their tickets would have been inspected by the gate-keeper, and no one would have been admitted unless his ticket entitled him to ride on that train. Soon after the train pulled out, the conductor came through the car in which Edwards and his companions were seated, collecting tickets and fares. Edwards presented the ticket above described, having attached a coupon for passage from Chicago to Lansing, upon which was printed, "Limited as per contract." The plaintiff had neglected or omitted to sign his name upon the back of the ticket as the original purchaser, and had neglected to have it stamped and dated upon the back by the ticket agent in Chicago. Upon presenting the ticket to the conductor, he refused to receive it, because it was not stamped nor dated by the ticket agent at Chicago, and did not contain the signature on the back, and informed Mr. Edwards that without these he could not take the ticket, and that he must get off at the Twenty-second Street station, when he could go back and get it stamped. Mr. Edwards declined to get off, and the conductor told him that he must get off at that station, or he would have to put him off. The train stopped at that station, but Mr. Edwards did not get off.

After passing the station, the conductor found him upon the train, and told him again that the ticket was worthless, and that if he insisted upon riding on that train he would have to pay his fare to Elkhart, which was his run, and he would give him a receipt for it, so he could show it to the company and settle the matter with them; and Edwards said he would pay his fare, as the conductor testifies; that he then made out a receipt; and when he presented it to Edwards, he then inquired if he would have to go through with the same thing with the next conductor, and was told he would. He then said he would not pay; that he had already paid his fare, and was going to ride home on the ticket. He explained to the conductor who he was and where he lived, and referred him

to three or four citizens of Lansing then sitting near in the car, who would identify him, and offered to pay the expense of a telegram to the agent at Lansing to verify the sale of the ticket to him. The conductor told him he was acting under rules of the company, which required him to refuse tickets which were not stamped and dated by the agent in Chicago, as required by the conditions of the ticket, and that unless he paid his fare he would put him off.

Mr. Edwards denies that he offered to pay his fare if he was given a receipt, but says the conductor offered to give him a receipt if he would pay his fare. After they had got about twenty-five miles out, the conductor asked to see the ticket. Edwards handed it to him, and he put it in his pocket, and told him, "When you pay your fare, I will give you your ticket and receipt." At the same time he explained to him that if he would pay his fare, and take a receipt for it, when he got to Lansing, and presented the receipt and ticket to the agent, his money would be refunded, and that if he did not pay his fare he would be put off at Elkhart. He refused to pay, and was put off at Elkhart. His ticket was handed back to him before he was put off. He brings this action, in trespass on the case, to recover his damages for being forcibly ejected from the train. The trial judge held that he could not recover.

It is claimed by counsel for plaintiff that the condition requiring the ticket to be stamped at Chicago was an immaterial condition, so long as the plaintiff had, to the certain knowledge of the conductor, taken passage at Chicago; that plaintiff was in a situation to, and offered to, identify himself as the proper person,—as the purchaser of the ticket; that the question of identity was, by the ticket itself, to be finally decided by the conductor; that the peculiar circumstances, including the terms of the ticket contract, distinguished this case from all those cases in which the reasonableness of conditions in tickets, limiting the use of them, have been passed upon by the courts. These distinctions are pointed out by counsel for plaintiff, as follows: "1. But one question arose, or could possibly have arisen, concerning his right to ride upon the ticket. That question, addressed to the conductor, was: 'Is this man who presents this ticket to me the person who bought it and owns it, and is entitled to ride upon it?' 2. That taking the condition, or all the conditions, of this ticket together, they give to the conductor the right and power

to pass finally upon this question; to answer it for the company; to determine the fact; 8. This power or right, being one provided in the contract itself, and for the benefit of the company, and it imposing a duty and obligation upon the passenger which he must discharge, upon request, to the company, also imposes a duty upon the company, its officers and agents."

Unquestionably, parties capable of contracting may enter into such agreements as they choose; and if they rest upon a sufficient consideration, and are not void for illegality, nor as being against public policy, they are binding upon them. The contract of carriage in this case, including the conditions, was a valid and binding agreement. The conditions were reasonable, and rested upon a sufficient consideration, namely, the reduced rate of fare. Ordinarily, a person going by rail from Lansing to Chicago would be required to purchase a ticket at the point of starting, and upon returning he would be required to purchase a ticket from the agent in Chicago, from that place to Lansing. Under the conditions of this ticket he is required to do no more than call upon the agent there to secure his passage from Chicago to Lansing in accordance with the conditions. There is nothing unreasonable or annoying in this requirement. The trouble to the passenger is no more than would ordinarily occur, except the signing of his name, and, if required, to identify himself, which he has received the consideration for in the reduced rate of fare. His contract with the company was, that it would transport him from Chicago to Lansing upon condition that he would present his ticket to the agent at Chicago, sign his name in compliance with the contract upon the back of the ticket, and have it dated and stamped upon the back by the ticket agent. This part of his contract he did not comply with. It was a condition precedent to his right to be carried from Chicago to Lansing upon that ticket. The unstamped ticket gave him no right to a return passage; and he absolutely refusing to pay his fare, there was no contract in force between the plaintiff and defendant company to carry him upon its cars. Under such circumstances, it had a right to eject him from its cars. The company had broken no contract, and was not in fault, but was ready to fulfill its contract according to its terms and conditions. This being so, it is difficult to see how its ejecting him from the cars, where he had no right to be, can be treated as a tort; it having used no more force than

was necessary to accomplish the purpose. To hold it liable would be to hold it responsible to plaintiff for the consequences of his own neglect, and failure to comply with the contract upon his part. This would be neither reasonable nor just.

The distinctions which the plaintiff's counsel seek to make, above stated, are not warranted by the contract. The plaintiff's right to ride on that ticket from Chicago to Lansing did not depend upon his being the identical person who purchased the ticket, but upon his compliance with the condition precedent of having it stamped and dated, and signing his name. He is not entitled to ride upon it on his return, unless this condition is complied with; and no power or authority is given to the conductor to finally determine whether he has a right to a passage upon that ticket, unless it is stamped, etc., in accordance with the contract. Neither could the conductor be called upon to enter upon an investigation of the identity of the plaintiff. This position is well answered by Mr. Justice Gray in the similar case of *Mosher v. St. Louis etc. R. R. Co.*, 127 U. S. 396. He says: "The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract,—to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor in examining the tickets of other passengers, and in conducting his train with due regard to speed and safety, that he should undertake to determine, from oral statements of the passenger, or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent of the Hot Springs Railroad Company at Hot Springs the only and conclusive proof." See also the late case of *Boylan v. Hot Springs R. R. Co.*, 132 U. S. 146. The authorities are uniform that, under a contract like the one in question here, there is no liability, either in tort or upon contract, where the plaintiff has failed to comply with the condition precedent stated above.

The judgment must be affirmed.

CARRIERS OF PASSENGERS—RULES AND REGULATIONS—TICKETS.—Railway companies, as common carriers of passengers, have the right to adopt reasonable rules and regulations as to the tickets and methods of paying fare

by passengers, and to remove from their cars, in a proper manner and at a proper place, persons refusing to comply with such rules and regulations: *McGowan v. Morgan's Louisiana etc. S. S. Co.*, 41 La. Ann. 732; 17 Am. St. Rep. 415, and note; *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422; 17 Am. St. Rep. 818, and note; compare *Carsten v. Northern Pacific R. R. Co.*, 44 Minn. 454; 20 Am. St. Rep. 589.

ANTCLIFF v. JUNE.

[31 MICHIGAN, 477.]

MALICIOUS PROSECUTION — JURISDICTION. — Where wrong and injury is done by a malicious suit, it is immaterial, upon principle, whether or not the court had jurisdiction to entertain such suit, in order that a recovery may be had for the malicious prosecution.

ACTIONS — SUFFICIENCY OF COMPLAINT. — For every malicious wrong there is a remedy, and under the prevailing liberal system of pleading, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named.

MALICIOUS PROSECUTION. — IT IS NOT NECESSARY, IN ORDER TO MAINTAIN action for the malicious prosecution of a civil suit, that the person should be molested or his property seized, if it appears that the suit was malicious, without probable cause, and that the party has been injured or damaged thereby.

PROCESS — JUSTICE'S SUMMONS IN ACTIONS COMMENCED under a statute authorizing its service in an adjoining county, when the demand sued on is principally for labor and services, must be directed to an officer of that county, otherwise the judgment is void.

MALICIOUS PROSECUTION — SUFFICIENCY OF COMPLAINT. — A declaration which fully sets out a conspiracy between the defendants to defraud the plaintiff, and the fact that he was defrauded out of his money paid upon a void judgment obtained by them through fraud, clearly sets out an actionable wrong, and one that can be recovered for in an action upon the case, no matter what it is named or called.

ACTION FOR ABUSE OF PROCESS. — Where process is willfully made use of for a purpose not justified by law, this is an abuse for which an action will lie.

PROCESS, ABUSE OF. — OBTAINING A JUDGMENT BY FRAUD AND PERJURY, not based upon any valid demand, and suing out execution upon such judgment knowing it to be false and fraudulent, and extorting money under such execution, is an abuse of process for which an action will lie.

ACTION on the case for malicious prosecution and malicious abuse of process.

Hewett and Freeman, and Austin Blair, for the appellant.

Barkworth and Cobb, for the appellee Crowell.

MORSE, J. This record presents the story of a most outrageous and wicked fraud, committed upon the plaintiff by an

abuse of the processes of the law, and one deserving of severe punishment. The chief defendant, J. Reid Crowell, is said to be an attorney at law, and resides at Brooklyn, Jackson County, in this state.

The story, briefly told, is this: The defendant Randy June pretended to have a claim of fifty dollars against the plaintiff, an old man over sixty years of age, and a farmer, living in the township of Manchester, Washtenaw County, which township adjoins the township of Norvell, in Jackson County, where June, a laborer, resided. In November, 1886, June put his claim in the hands of Crowell for collection. Crowell understood what the claim was for, told June it was collectible, and, as he (Crowell) testifies, was to have all he collected over forty dollars. Without attempting to collect it without suit, Crowell went, January 3, 1887, to Joseph M. Griswold, a justice of the peace in the village of Brooklyn, Columbia township, Jackson County, and took out a summons in favor of June against Antcliff, who is the plaintiff in this suit. Such summons was made returnable January 11, 1887, and commanded the constable to summon Antcliff, "if he shall be found in your county, to answer to June in a plea of trespass on the case upon promises, to his damages three hundred dollars or under."

This summons was directed to any constable of Jackson County, and was handed by Crowell to one Brenner, a deputy sheriff of Washtenaw County, to serve, he claiming that there was a new statute, under which Brenner could make service in Washtenaw County. Brenner returned the summons as personally served upon Antcliff in the township of Manchester, January 4, 1887. The statute referred to is Howell's Statutes, sec. 7216 (act No. 246, Laws 1879, p. 249). Between the day of this service and the return day of the summons, Antcliff received an unsigned letter, stating that he had better not appear. The following is the letter:—

"BROOKLYN, February 3, 1887.

"MR. ANTCLIFF.

"Don't let Mr. Crowell or any one else fool you into coming into Jackson County. All they serve those kind of papers on you for is to get you into this county; then they will serve another kind of summons on you. Look out for them."

In consequence of this communication, Antcliff did not appear. On the return day, June and Crowell were on hand. No one else was present except the justice. His docket shows

that plaintiff filed an affidavit on that day, stating, in substance, that he was a resident of the township of Napoleon, in Jackson County; that the defendant was a resident of Manchester, Washtenaw County; that the suit was commenced for the recovery of the value of personal services rendered by him for Antcliff, at the latter's request; and that Jackson and Washtenaw were adjoining counties. This affidavit was prepared by Crowell. Crowell also filed a declaration upon some of the common counts as follows: "In the sum of three hundred dollars, for goods, wares, and merchandise, sold by plaintiff [June] to defendant [Antcliff], at his [defendant's] request, and in a like sum on account stated between them; and in the sum of three hundred dollars for work and labor performed by plaintiff for the defendant at his [defendant's] request."

No bill of particulars was filed. The justice's docket further shows as follows:—

"After waiting one hour, and defendant not appearing, I proceeded to hear and try the cause. Plaintiff, being sworn in his own behalf, testified that he was a resident of the township of Napoleon, Jackson County, Michigan; that he was acquainted with John Antcliff, the defendant, who resides in Manchester, Washtenaw County, Michigan; that in the year 1886 he performed personal labor for the defendant at his (defendant's) request, which said personal labor was worth the sum of three hundred dollars; that the same was now due and unpaid.

"There being no witnesses on the part of the defense, and no one appearing for the same, and having waited one hour, therefore, after hearing the testimony of the plaintiff, and in pursuance of a statute approved May 31, 1879, entitled 'An act in relation to the commencement of actions relating to real estate, and for labor or services, and service of process therein,' which act, among other things, provides that in all actions wherein the demand shall be principally for labor or services performed by an individual or company, or commenced in any court of competent jurisdiction in the county where the lands may be situated, or wherein the labor or services were rendered or performed, or in which the plaintiff or plaintiffs reside, the process or declaration by which such action shall be commenced may be served within any county within this state adjoining that county in which such action shall be commenced, against any individual, company, or the proper officer of any corporation, within this state; provided, that if

such service shall be made in any other than such county where such action shall be commenced, service shall be made by the sheriff or any constable of the county where service shall be made, or by any person authorized to make such service, but the officer making such service being only entitled to fees for travel in his own county, — I hereby render judgment forthwith in favor of the plaintiff, Randy June, and against the defendant, John Antcliff, for the sum of three hundred dollars (\$300) damages, and two dollars and sixty cents costs of suit.

JOSEPH M. GRISWOLD,

“Justice of the Peace.”

The justice testified, on the trial of the present suit, that the docket contains the substance of the testimony, and that no explanation or evidence was given before him, showing what the services and labor were, or any part thereof. Crowell asked the questions, and June answered. This Crowell admits.

Five days after the rendition of this judgment, Crowell appeared before the justice, with a transcript of the judgment made out, and filed an affidavit, stating therein that there was due and owing upon said judgment the sum of three hundred dollars, exclusive of costs, and that he had good reason to believe, and did believe, that there was not sufficient goods and chattels liable to execution to satisfy said judgment, within the county of Jackson, belonging to said John Antcliff. The transcript was procured, and filed by him with the clerk of the circuit court of Jackson County on the same day. Execution was issued the same day on this transcript, and taken by Crowell to Ann Arbor, and put into the hands of William Walsh, sheriff of Washtenaw County. It was there agreed between Crowell and the sheriff that the latter should meet him in the village of Manchester, on January 27, 1887, and they two then to go together to the farm of Antcliff, to collect the execution.

On the last-named day, Crowell and his father-in-law, one Charles E. Parker, of Addison, Lenawee County, who is, or claims to be, a lawyer, met the sheriff at Manchester, and from there started for the farm of Antcliff. Upon the way there, they met Antcliff and his wife on their way to town. They informed Antcliff of the execution. He denied owing June a cent, but, upon threats of a levy, he and his wife went back to his farm with them. While there, Crowell and Parker threat-

ened to have the sheriff levy on the farm if the judgment was not paid, as there was not, as they said, personal property enough to pay it. Antcliff, before going back to the farm, wanted to go on to the village, and see an attorney, Mr. Freeman, but he was told by all three of them that if he did, they should go on to his farm and levy upon it. Considering the fact that Antcliff was a well-to-do farmer, with plenty of property out of which to make this execution, and that it had been in the hands of the sheriff for ten days without any notice to Antcliff, the part played by this official, according to his own showing in his testimony, is not very creditable, to say the least. Finally, under the threats of Crowell and Parker to drive off his stock and to also levy on his farm, and also influenced by his scared wife, he settled the matter up by paying them \$240 in cash. Out of this money Crowell paid the sheriff his fees; something (how much he does not tell) to another lawyer, Patchin, and fifty-seven dollars to June. The rest he seems to have put, where he thought it would do the most good, in his own pocket. It seems also that he paid twenty-seven dollars of this fifty-seven dollars to June under a sort of duress. He testifies that June kept coming to him, saying: "Now, if you don't pay me something, Hewett [attorney for Antcliff] has been to see me, and he says he will do the fair thing by me, and you ought to give me a little more out of that.' I can't tell how many times I gave him ten dollars. I gave him ten dollars twice, and I gave him seven dollars once."

Is not this a shameful story, much of it coming from his own lips, to appear in cold print against an attorney at law in our state? It is to be hoped that he has never been formally admitted to our courts. If he has, the attention of the bar of Jackson County is respectfully directed to the record in this case, and it is to be hoped that they will take notice of it by instituting the proper proceedings to disbar him; and the prosecuting attorneys of Jackson and Washtenaw counties should, if possible, find some means by which this conspiracy and fraud against this old man can be adequately punished.

The plaintiff brought this suit in the circuit court for the county of Jackson against Randy June and J. Reid Crowell. It was commenced by *capias ad respondendum*, April 5, 1887. May 18, 1887, a motion was made to discharge the defendants, on the ground that the affidavit for the writ did not set out a legal cause of action. December 17, 1887, this motion was denied. February 3, 1888, the plaintiff filed his declaration.

It was served upon one of the firm of attorneys who appeared for the defendants in the above motion. The default of the defendants for not pleading was entered April 8, 1888. This default, as to the defendant J. Reid Crowell, was set aside upon stipulation of attorneys filed September 26, 1888, and upon motion of the defendant J. Reid Crowell, in open court, October 1, 1888. The defendant Crowell pleaded the general issue. No plea was ever interposed in behalf of June, and he stands defaulted for not pleading. It does not appear that he was present on the trial, nor was his testimony obtained by either party. After the testimony was all in, the substance of which has been heretofore given, the circuit judge, Hon. Erastus Peck, was of the opinion that, upon the pleadings and all the evidence, the plaintiff's action could not be maintained, and directed a verdict for the defendants. This ruling is alleged as error.

The declaration contains two counts, the first being, it is claimed by defendant's counsel, in form a count for malicious prosecution of a civil action against the plaintiff. The second count sets up the same state of facts as the first, and further avers that the defendants, in obtaining the summons, falsely and maliciously intended to so use it as to obtain an illegal and fraudulent judgment against the plaintiff for the sum of three hundred dollars, and to obtain execution, and to use the same for the purpose of extorting the said amount of money from the plaintiff.

The declaration reads as follows:—

“State of Michigan.
Circuit Court for the County of Jackson. } ss.
Jackson County.

“John Antcliff, plaintiff in this suit, by Hewett and Freeman, his attorneys, complains of Randy June and J. Reid Crowell, defendants in this suit, being in custody, etc., of a plea of trespass on the case;

“For that whereas the said defendants heretofore, to wit, on the third day of January, A. D. 1887, at the township of Columbia, in said county, went and appeared before one Joseph M. Griswold, then and there being one of the justices of the peace in and for said county of Jackson, and then and there, before the said justice, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said justice to issue and grant him certain

summons against the said plaintiff, and in favor of the said Randy June as plaintiff therein, as follows, to wit: —

“ ‘State of Michigan,
County of Jackson. } ss.

“ ‘*To Any Constable of Said County, Greeting:* In the name of the people of the state of Michigan, you are hereby commanded to summon John Antcliff, if he shall be found in your county, to appear before me, one of the justices of the peace in and for said county, at my office in Columbia, on the 11th of January, A. D. 1887, at ten o'clock in the forenoon, then and there to answer to Randy June, in a plea of trespass on the case upon promises, to his damage three hundred dollars or under.

“ ‘Hereof fail not, but of this writ, with your doings, make return according to law.

“ ‘Given under my hand at Columbia, Jackson County, this third day of January, A. D. 1887.

“ ‘JOSEPH GRISWOLD,

“ ‘Justice of the Peace.’

“And the said defendants afterwards, to wit, on the same day of the date of said summons, delivered the same to one Michael Brenner, who claimed to be a deputy sheriff of the county of Washtenaw, and then and there, without any reasonable or probable cause whatever, caused and procured the said pretended deputy sheriff of the county of Washtenaw to serve the said summons, so issued as aforesaid by said justice of the peace, upon the plaintiff in the said county of Washtenaw, he, the said plaintiff, being then and there a resident of the said county of Washtenaw, and not of the county of Jackson; and the said Michael Brenner, as such deputy sheriff as aforesaid, returned the said summons to the said justice on or before the return day thereof, with a return of personal service thereon indorsed by him, and filed the same with the said justice of the peace; and afterwards, to wit, on the eleventh day of January, 1887, the said defendants, without any reasonable or probable cause whatsoever, caused and procured the said justice of the peace then and there to give and enter in his docket a judgment in favor of said Randy June, and against this plaintiff, for the sum of \$300 damages and \$2.60 costs of suit, they, the said Randy June and J. Reid Crowell, knowing that the said justice had no jurisdiction of the said pretended cause so pending before him.

wards, to wit, on the seventeenth day of January, 1887, falsely and maliciously caused and procured the said justice to make and issue a transcript of said pretended judgment in due form, and duly certified by said justice, and afterwards, to wit, on the same day last mentioned, filed the said transcript in the office of the clerk of the circuit court for the county of Jackson, and then and there caused the said clerk to enter and docket the same as a judgment of the circuit court for the county of Jackson; and at the same time of entering and docketing said transcript judgment, the said defendants caused and procured the said clerk of the circuit court to issue an execution upon said pretended judgment in due form, and directed to the sheriff of said county of Washtenaw, and on the same day delivered the said execution to William Walsh, sheriff of said Washtenaw County; and afterwards, to wit, on the twenty-seventh day of January, 1887, the said defendants caused and procured the said William Walsh, sheriff as aforesaid, to proceed to collect the said execution from the plaintiff, and force him, the said plaintiff, to pay the same; and the said plaintiff, then and there, against his will, and protesting that he was not liable to pay the same, or any part thereof, was forced and compelled by said sheriff, in order to protect his property from levy and sale, to pay the same to him, and did pay to him, for said defendants, the sum of \$240 in money, — all which said several grievances in this court mentioned were done and committed by said defendants against the plaintiff, falsely and maliciously, and without any reasonable or probable cause whatsoever.

“By reason of which said several premises the said plaintiff has been and is greatly injured, and put to large expense and trouble, and to great anxiety, and has been and is otherwise greatly injured in his credit and circumstances, to the damage of the plaintiff of five thousand dollars, and therefore he brings this suit. “HEWETT AND FREEMAN, Plaintiff's Attorneys.

“AUSTIN BLAIR, of Counsel.”

It is claimed by defendant's counsel that the declaration is not good for malicious prosecution, — first, because it alleges that an erroneous judgment was taken, and jurisdiction was lacking in the court resorted to, and that the facts show that the plaintiff denied the jurisdiction of the justice, and refused to participate in any manner in the proceedings directly produced by the prosecution; that he was therefore in no wise injured by the commencement of this suit and the taking of

this judgment; also, that no case can be found where an action for malicious prosecution has been sustained, where the pleadings show a determination in the original action against the party claiming damages for malicious prosecution.

The facts in the case do not show that plaintiff denied the jurisdiction of the justice, and refused to participate in the proceedings on that account. It is true he did not appear, because of the letter he received (which was probably sent to him by Crowell or a confederate, and which the court erred in not admitting in evidence); but afterwards, when the parties came to him with an execution issued upon a pretended judgment, docketed in the circuit court for the county of Jackson, and he was prevented from seeing an attorney, he was led to believe the judgment was a good one, and acted accordingly, and the purpose of the conspirators was accomplished; and the fact of the court not having jurisdiction, when it was not known by him at the time the injury by such prosecution was inflicted, cannot be used as a bar against his relief or remedy for such injury.

In *Sweet v. Negus*, 80 Mich. 406, it was held that where the want of jurisdiction did not appear upon the face of the warrant, it could not bar the action; and the point whether, when the justice had by law no jurisdiction of the subject-matter, or a total want of jurisdiction otherwise appears upon the face of the warrant, the proceedings could properly be called a prosecution, was expressly not passed upon. I am satisfied, however, that if the wrong and injury is done by a malicious suit, it is immaterial, upon principle, whether the court had jurisdiction or not to entertain such suit. For every malicious wrong there is certainly in this day and age a remedy; and under our liberal system of pleading in this state, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named or called.

The first count of the declaration plainly shows a malicious and actionable wrong, and every averment was supported by cogent proof. It may be that the prosecution of the suit to judgment in the justice's court by itself alone did not touch the person or property of the plaintiff, but the writer of this opinion, in *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, held that it was not necessary, in an action for the malicious prosecution of a civil suit, that the person should be molested or property seized, if it appeared that the suit was

malicious, and without probable cause, and the party had been injured or damaged thereby: See 68 Mich. 596-598, and cases there cited. I am still of the opinion there expressed, and have been fortified in my position by the facts of this case, and the decisions of other courts not cited in *Brand v. Hinchman*, 68 Mich. 590; *McPherson v. Runyon*, 41 Minn. 524; 16 Am. St. Rep. 727; *Pope v. Pollock*, 46 Ohio St. 367; 15 Am. St. Rep. 608; *Allen v. Codman*, 139 Mass. 136. See also discussion of this question by J. D. Lawson in 21 Am. Law Reg. 281, 353.

It is true that the general rule is, that to support an action for malicious prosecution the plaintiff must establish three things: 1. The fact of the alleged prosecution, and that it has come to a legal termination in the plaintiff's favor; 2. That the defendant had not probable cause; 3. That he acted from malicious motives: *Hamilton v. Smith*, 39 Mich. 222, 225.

In the case before us, the defendants had no probable cause against Antcliff. It was conclusively shown that June never had any claim against Antcliff, except one for fifty dollars for getting him a wife, and never pretended to have any other; and from Crowell's own testimony it is apparent that he knew this. He testified that June told him of some other items of account, but he cannot remember any except the one of fifty dollars. The judgment was taken for three hundred dollars. Witness swore that June told him he did this because Crowell told him he might just as well get a judgment for three hundred dollars as for fifty dollars. Crowell does not deny this in his testimony. The taking and collecting of a judgment for three hundred dollars, under these circumstances, shows malice.

But the defense urge that the other element is wanting; that the proceeding or suit did not terminate in plaintiff's (Antcliff's) favor. In this case, however, the judgment was void upon the face of the justice's docket and files. The summons was not issued under Howell's Statutes, sec. 7317. It was directed to any constable of Jackson County, and could not be served by an officer of Washtenaw County, the same as in any ordinary suit. The making of the affidavit upon the return day of the summons, and the judgment entry attempting to bring the case within section 7317, were futile. When a suit is commenced under this section, and the defendant is not a resident of the county where suit is brought, and it is intended to gain jurisdiction by service in the adjoining county, the process must be issued directed to an officer of

that county. He has no power to serve process directed to a constable of another county, unless specially authorized so to do by law. It was not intended by the legislature that an ordinary justice's summons, directed to any constable of the county within which the justice has jurisdiction, could be taken by the plaintiff, and handed to a constable or sheriff of another county for service, without some showing upon the writ that the suit was intended to be brought under section 7317. The act, if valid, is a special one, and applies only to special cases. The whole thing was a fraud from the beginning. The labor and services spoken of were not a valid claim if performed, as it would be against public policy to allow marriage brokerage.

But it is not necessary to determine whether the first count was a good one, in an action for malicious prosecution. It sets out fully a conspiracy between the defendants, June and Crowell, to defraud the plaintiff, and that he was defrauded out of the money paid upon this void judgment. It therefore clearly sets out an actionable wrong, — one that can be recovered for in an action upon the case, — and it is immaterial what it is called.

The second count is also good. If process is willfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie: See Cooley on Torts, and cases cited, 189, 190. I can conceive of no case of any greater abuse of process than this. There was nothing to base it upon in the beginning, and it was procured, in every stage of the proceeding thereafter, by fraud and perjury, which ought to be punished by a term in state prison to both of the defendants. It was used for no lawful or legitimate purpose. If "entering up a judgment and suing out execution after the demand is satisfied" is an abuse of process (*Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574), then, certainly, obtaining a judgment by fraud and perjury, when there was never any demand in favor of June against Antcliff, and suing out an execution upon such judgment, when the defendants knew that it was false and fraudulent, and extorting money under such execution, is also an abuse of process.

The learned judge of the Jackson circuit was in error in directing a verdict for the defendants. The judgment of the court below is reversed, and a new trial granted the plaintiff, with costs of this court.

MALICIOUS PROSECUTION. — An action for damages may be maintained for the malicious prosecution of a civil suit without probable cause, to the injury of defendant therein, even though there was no interference with his person or property: *McPherson v. Runyon*, 41 Minn. 524; 16 Am. St. Rep. 727. Upon the question of the malicious prosecution of a civil suit, see note to *Williams v. Hunter*, 14 Am. Dec. 599-603; *McCardle v. McGinley*, 86 Ind. 538; 44 Am. Rep. 343, and note 345-348; note to *Burton v. Knapp*, 81 Am. Dec. 476-480; *Vela v. Guerra*, 75 Tex. 595.

MALICIOUS PROSECUTION. — Three things must be shown to maintain an action for malicious prosecution; the want of probable cause, the existence of malice, and that the prosecution is ended when the action is commenced: *Stoddard v. Roland*, 31 S. O. 342; *Livingstone v. Hardie*, 41 La. Ann. 311. "Malice means wickedness of purpose, or a spiteful or malevolent design against another, or a purpose to injure another, or a design of doing mischief, or any evil design, or an inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do an injury to another, or absence of legal excuse, or any other motive than that of bringing a party to justice": *Shannon v. Jones*, 76 Tex. 141. "Probable cause means a reasonable ground of suspicion, supported by facts and circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged": *Shannon v. Jones*, 76 Tex. 141; *Anderson v. How*, 116 N. Y. 338. The question of malice is one of fact, and the existence of probable cause is a question both of law and fact: *Shannon v. Jones*, 76 Tex. 141. Where there is no dispute as to the existence of the facts, probable cause is to be determined by the court alone: *Anderson v. How*, 116 N. Y. 338; *Gilbertson v. Fuller*, 40 Minn. 413.

MALICIOUS PROSECUTION — PROPER FORM OF ACTION. — Action on the case is the proper remedy against a person sought to be charged with liability for a malicious prosecution: *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611, and note. But see *Kramer v. Lott*, 50 Pa. St. 495; 88 Am. Dec. 556, and note.

SHIPLEY v. COLOLOUGH.

[81 MICHIGAN, 624.]

NEGLIGENCE — LIABILITY FOR DAMAGE DONE BY CATTLE UNLAWFULLY IN HIGHWAY. — One who turns his cattle loose into a highway, leaving them unattended, in violation of a statute, assumes all the risks of such action, and is liable for damage done by them in overturning a sulky lawfully in the highway.

Brooks and Conway, for the appellant.

Herbert A. Forrest, for the respondent.

CAHILL, J. In December, 1888, the defendant, Colclough, was the owner of land lying on both sides of a public highway in Buena Vista township, Saginaw County. He was accustomed, at that time, to drive his cattle every morning from his field on the south side of this highway, and in a westerly

direction, about forty-five rods along the highway, and into his field on the opposite side of the road. This highway was very little traveled, but crossing it at nearly right angles, and not far from this place, was the Genesee plank-road, a great thoroughfare. Plaintiff's son, Colon Shipley, was in the habit of driving plaintiff's cattle along this highway every morning, to a field east of Colclough's land. In doing this, he drove a horse hitched to a sulky.

Plaintiff's claim is, that Colon, returning one morning from this task, and riding in the sulky, was met by two of Colclough's cows on this road opposite Colclough's land; that one of the cows hooked and pushed the other against and down under the wheel of the sulky, and that the cow, in rising up, overturned the sulky, and it was thus broken, and otherwise injured. He further claims that the cows were at the time running at large by reason of defendant's carelessness and negligence in turning them into the road, and in going off and leaving them unattended. It was admitted that the statute prohibiting cattle running at large in the highway was in force there at that time. Plaintiff sues for damages thus done to the sulky.

Colclough defended on two grounds, claiming,—1. That the cattle were not at large; 2. That even if they were at large, plaintiff could not recover, because the circumstances did not constitute actionable negligence, and because it was not shown that the cows had any vicious or dangerous habit or propensity which should have led defendant to anticipate and guard against such injury.

And the defendant took the position that the fact of the cows being at large in the public highway did not change this rule. This raises the only question in the case. The judge charged the jury as follows:—

“By the statutes of our state, cattle are not allowed to run at large, unless there is permission granted by the board of supervisors in certain cases. For the purpose of this case, I might say to the jury that cattle of the character described by the witnesses here are not allowed to run at large in the highway in the township of Buena Vista, this county. Where cattle are in the highway, and are attended by the owner, or some person in his behalf, being driven along the highway, they are not considered as running at large. It would be entirely proper for the owner of cattle driving them from one inclosure, or one field, across the highway, or up and down

the highway, to enter another field for purpose of pasture; and if he did so, he is not doing an unlawful act.

"In this case, if you find as a matter of fact that Mr. Colclough, the defendant, drove his cattle from the field upon his farm, into the highway, for the purpose of having them enter another field on the opposite side of the highway, where he had a pasture, the question then for you to consider would be, whether in doing that act he exercised reasonable care in taking the cattle from one field to the other; that is, so that they would not go astray, and be in fact at large. In determining that question you will consider the number of cattle that he had in charge that morning (if you find that he was in charge of the cattle), the character of the cattle, and the time when they were driven into the road by him, the time in the morning, the extent of the travel in the cross-road, in determining the question of reasonable care on his part."

This instruction was as favorable to defendant as he was entitled. In turning a herd of cattle loose into the highway, and going away and leaving them unattended by any one, defendant violated a statute of the state, and he assumed all the risks of such action. The authorities are almost uniform that "the violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur": 1 Shearman and Redfield on Negligence, sec. 13.

"These principles apply not only where the statute or ordinance declares that persons violating it shall be liable for any damage sustained by reason of its breach, but also where it contains no such provisions, and simply imposes a penalty, by way of fine or otherwise, for disobedience. Nor is the plaintiff, in such a case, bound to prove that the act required by the law was one which by its nature was essential to the exercise of due care by the defendant": 1 Shearman and Redfield on Negligence, sec. 13.

In the case of *Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684, upon which counsel for defendant rely, the court clearly intimated that if the horse had been unlawfully in the highway the conclusion of the court would have been different; but in that case it was held that the horse was not unlawfully in the highway. The court uses this language: "The whole trial, including the charge of the court, proceeded upon the

assumption that the defendant had no right to have or permit his horse to be loose in the highway, and that if he was there through the carelessness of the defendant, he (the defendant) was liable in law to respond to any damage that should be caused thereby. If this is the true view of the subject, we should have no great difficulty in upholding the verdict under the charge, in its relation to the evidence given on the trial."

There is no error in the judgment, and it will be affirmed, with costs.

ANIMALS — HIGHWAYS. — The owner of animals must keep them upon his own premises, and he cannot use the public highway for a public pasture for them: *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323; 19 Am. St. Rep. 174. The owner of domestic animals is responsible for mischief committed by them, when they are in a place where it is unlawful for them to be: *Decker v. Gammon*, 44 Mo. 323; 69 Am. Dec. 99; *Onnot v. Larson*, 43 Wis. 536; 28 Am. Rep. 567.

ENGEL v. SMITH.

[82 MICHIGAN, 1.]

NEGLECT — FAILURE TO GUARD TRAP-DOOR. — The mere existence and use of trap-doors, elevator-shafts, and similar openings in floors of warehouses, manufactories, or other business buildings is not evidence of negligence; still, they are dangerous openings, especially if located in places obscured by darkness, or in such close proximity to doors that a person entering may step into them unaware. The fact of their dangerous character makes it the duty of those maintaining them to properly guard them when they are open. If it is not practical to guard them with a railing, the owner is bound to give actual notice of the danger to any one lawfully approaching them, and in default of such notice is liable for all injuries resulting therefrom.

CONTRIBUTORY NEGLIGENCE — FAILURE TO LOOK OUT FOR OPEN TRAP-DOOR. — It is not contributory negligence in an employee to fail to look out for danger arising from an open trap-door, when there is no reason on his part to apprehend any such danger. Every one has a right to presume that another, owing a special duty to guard against danger, will perform that duty.

WHEN QUESTION OF CONTRIBUTORY NEGLIGENCE IS NOT FREE FROM DOUBT, the facts should be submitted to the jury.

NEGLECT — FAILURE TO GUARD TRAP-DOOR. — Where injury results from a failure of employees to properly guard an open trap-door while in use, their violation of instructions to guard it cannot be shown in defense.

Eldredge and Spier, for the appellants.

John W. McGrath, for the respondent.

CAHILL, J. This suit was commenced by declaration to re-

cover for injuries received by plaintiff, by his falling through a trap-door in the store of defendants on January 26, 1888.

The building of defendants had, prior to their entry therein been occupied by one Morehouse as a hardware-store. Plaintiff had been employed by Morehouse as a tinsmith. The shop in which he worked was on the second floor. Plaintiff's only means of access to the shop in which he worked for Morehouse was by way of the front door of the store, and up inside stairs; at that time there being no stairs to the rear door of the store. The store fronted west on Main Street, and along the south side of it ran Lafayette Street. Some months before the accident, the defendants came into possession of the store, and plaintiff was permitted to continue his business in the shop he had worked in for Morehouse. Some time after the defendants took possession, the post-office was moved into the store. Up to this time, the back door of the store was only used to receive goods in, and not as a way to the store. The testimony tends to show that after the stairs were put up at the back door of the store, leading from the ground to a platform, most of the people coming to the store from the east entered it by the back door. The stairs and platform were narrow, and without rail.

The trap-door or hatchway through which plaintiff fell was in front of the back door, and from a foot to a foot and a half distant from it. It had been there from the erection of the building, and was used as a way through which to hoist heavy goods from the cellar to the store floor, and through a trap-door overhead to the second floor. Plaintiff, after the back stairs had been put up, had been accustomed to have his wood taken up the back way, by the load or cord at a time, having it thrown on the platform, and carried up in baskets. It was the custom of those employed in the store in the morning to use the hatchway for throwing up from the cellar the day's supply of wood. This custom was known to the plaintiff. It was also usual to keep the back door locked when the trap-door was open. The door of the hatchway, when opened, rested against a desk, and could be seen by one on the platform, about to enter the door, through the glass, which extended from the latch up. The plaintiff testified that some of the panes of glass were gone, and had been replaced by tin. He said: "I did not look through the window. I could n't." He was not asked, and did not say, why.

On the morning of the accident the store was opened by

Wilber Smith, a son of one of the defendants. The plaintiff entered with him, went up to his shop, built his fire, came down, and went to his breakfast. Wilber Smith testified that he did not see him go out. Soon after the plaintiff and Smith entered, Ernest Brabb, a son of the defendant Brabb, came in. He sprinkled the floor, and began sweeping out. He saw the plaintiff go out. Young Smith, as usual, opened the trap-door, and went down cellar to throw up wood. Ernest Brabb was at the other end of the store, sweeping. Both Smith and Brabb testified that they did not remember having unlocked the back door that morning; but as there was no evidence that any one else was there who could have done so, the jury must have concluded that they were mistaken. The plaintiff lived north and east from the store, and in returning from breakfast came to the rear of the store from the east, picked up an armful of wood, and carrying it up the outside stairway, opened the rear door, and stepped in, and in doing so fell through the hatchway, and was injured. On hearing the door open, the young man in the cellar, looking up, saw the plaintiff, and called loudly to him; but the plaintiff says he did not hear him. In the fall, the plaintiff's leg was broken just above the ankle, and his arm and shoulder badly bruised.

The negligence charged is, that the defendants failed to properly guard the hatchway while it was open, or to warn the plaintiff of the danger. The plaintiff recovered a judgment of one thousand dollars, and the defendants bring error. Errors are assigned upon the admission and rejection of evidence, and upon the charge and refusals to charge of the court; but the principal questions in the case are: 1. Were the defendants guilty of negligence? 2. Was the plaintiff guilty of contributory negligence?

It is not charged that the maintenance of this hatchway was of itself negligent. Trap-doors, elevator-shafts, and similar openings in floors have long been a usual and necessary part of the appliances of business in most warehouses, manufacturing, and other business buildings. The mere fact of their existence and use is no evidence of negligence. But they are dangerous openings, especially if located in places where they are obscured by darkness, or in such close proximity to doors that a person entering the door may step into them unawares. The fact of their dangerous character makes it the duty of those maintaining them to properly

guard them when they are open. If, as in the case of this hatchway, it is not practical to guard it with a railing, it has been held that the owner is bound to give actual notice of the danger to every person lawfully approaching the place, and in default of such notice, he is liable for all injuries resulting therefrom: *Shearman and Redfield on Negligence*, sec. 719, and cases cited.

It would seem, under the circumstances of this case, that the defendants could only properly guard this hatchway by locking the back door when the hatchway was open, or by stationing some one at the opening to give actual notice to any one who might approach it. Its close proximity to the door made it extremely difficult for one entering the door without notice that the hatchway was open, to stop in time to save himself from falling into it. There was abundant evidence tending to show the defendants' negligence. Young Brabb saw the plaintiff come down stairs and go out of the store. He could not know by which door he would return, as both doors were used freely by people coming to the store or post-office. There were two young men in the store at the time, one of whom ought to have stood guard while the trap was open. If the back door had been locked, the accident could not have occurred. One or the other of these precautions was necessary, and ordinary care required the defendants and their employees to observe them.

The question of the plaintiff's contributory negligence is one of more difficulty. He knew as much about the location of the trap-door as did the defendants. He knew that it was customary for defendants to use it at that time of the day in throwing up wood for the use of the store. He did not think, upon opening the door, to stop and examine to see whether the trap was open before stepping in. Any thought on his part at the moment would have prevented the accident, and the question is a very close one as to whether the duty on his part of taking care was not as great, under the circumstances, as was the duty of the defendants. The controlling fact in the case seems to be, however, that the negligence of the defendants' employees was active. The opening of the trap-door was a circumstance which of itself called their attention to the duty of guarding it. It was a warning which, with their knowledge of the frequency with which the back door was used, they could not disregard without being guilty of negligence as a matter of law. The plaintiff had no such

Immediate warning. Neither did he have any reason to apprehend danger. It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any: *Beach on Contributory Negligence*, 41, and cases cited. The authorities cited by the learned commentator go much further than the text, and state the rule to be that every one has a right to presume that others, owing a special duty to guard against danger, will perform that duty: *Grand Rapids etc. R. R. Co. v. Martin*, 41 Mich. 667. As we have said, the question is one of some difficulty, and is not free from doubt. We have held that in such cases the facts should be submitted to the jury: *Palmer v. Harrison*, 57 Mich. 188; *Dundas v. Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457.

The plaintiff, when on the stand, was allowed to answer this question: "What is the fact about people waiting about the trap-door for mail?" And Miss Cargill was allowed to answer the question, "To what extent was that portion of the store in the rear, right opposite the post-office, used by the public?"

This evidence was objected to by the defendants' counsel, and error is assigned upon its admission. It is claimed that this testimony in no wise tended to show negligence on the part of the defendants in the use of the hatchway at the time of the accident, but that it was likely to prejudice the jury, by conveying the idea that it was negligence for the defendants to have the hatchway at that place at all. We do not see how this testimony was very material. It might possibly tend to show additional reasons for the exercise of due care by the defendants. The accident occurred at half-past seven in the morning. At that hour, it was not unlikely that people might come into the post-office, and in such case the trap-door would be a source of danger. We cannot say that the admission of this evidence was error.

James McFarlane, a witness for defendants, and long employed as clerk in the store, up to the date of the accident, testified that when using the trap-door the back door was usually kept fastened. He was asked: "What instructions were given by Smith and Brabb in regard to that?"

This was objected to by plaintiff, and excluded. It is claimed by defendants' counsel that they ought to have been allowed to prove that the defendants had given instructions to their employees to keep the back door fastened when the trap-door was open. We do not see how this is material. The

injury complained of resulted from the negligence of the defendants' employees in not locking the back door, or properly guarding the trap-door. For this the defendants were liable, and they could not be relieved from such liability by showing that they had given their employees different instructions.

Various errors are assigned by defendants upon the refusal of the court to give certain of their requests to the jury. We have examined them carefully, and are of the opinion that all of the requests that ought to have been given in fact given, in substance, in the charge of the court.

The judgment is affirmed, with costs.

NEGLIGENCE—DUTY OF AN OWNER TO KEEP HIS PREMISES IN A REASONABLY SAFE CONDITION.—While a land-owner is not under obligation to strangers to put guards around excavations made by him upon his own premises, and owes no duty to trespassers to keep his premises safe, still he must use due care to prevent injuries to such persons as come upon his premises at his invitation, express or implied: *Note to Bedell v. Berkey*, 15 Am. St. Rep. 374, 375.

NEGLIGENCE, PRESUMPTION OF, FROM ACCIDENT.—As to whether or not a *prima facie* case of negligence is established against a defendant by the mere proof of the happening of an accident, see note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495.

MASTER AND SERVANT.—A servant has the right to presume that his master has performed his duty with respect to furnishing safe machinery with which to work and safe premises in which to work: *Richmond etc. R. R. Co. v. Williams*, 86 Va. 165; 19 Am. St. Rep. 876, and note.

CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.—The question of contributory negligence is one of fact for the jury, unless from the undisputed evidence only one conclusion can be drawn, in which event the question becomes purely one of law: *Mathews v. Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436, and particularly note; *Nadas v. White River L. Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and note.

BATES v. KELLEY.

[82 MICHIGAN, 91.]

JUDGMENTS—RES JUDICATA—WRIT OF PROHIBITION.—When, in an action between mother and son, to which the administrator of the latter is made a party, a deed purporting to have been executed by the mother is adjudged to have been a forgery, such administrator cannot afterwards maintain an action against her attorney to recover damages for his alleged mutilation of the deed. The subject-matter of the latter action is *res judicata*, and a writ of prohibition will lie to stay all proceedings therein.

George W. Bates, in pro. per., and Levi T. Griffin, for the petitioner.

James D. Turnbull, for the respondent.

GRANT, J. One Cynthia W. Crawford filed a bill of complaint in the Presque Isle circuit court, in chancery, to set aside a deed purporting to have been executed by her to her son. The sole question was, whether the deed was forged. That suit was brought to a final determination in this court, and decided in favor of the complainant, the court holding that the deed was forged. *James D. Turnbull*, administrator of the estate of complainant's son, was a defendant in that suit: *Crawford v. Hoeft*, 58 Mich. 1-25. Some time after the determination of that suit, Turnbull, as administrator, commenced a suit at law in the circuit court for the county of Alpena, against relator, charging him with the mutilation of the deed, and seeking to recover damages therefor. The declaration sets forth the proceedings in this court in the case above referred to, and alleges that this court was wholly mistaken in the opinion and decree therein rendered, and was imposed upon by the acts of the relator.

If this were true, the only course open to the defendants in that suit is by application to this court for a rehearing. They did make such application, and it was denied. They now seek to reopen the issue there adjudicated and settled, in a suit at law and in another court. The bare statement of the case is sufficient to condemn the proceeding. The respondent had no right or jurisdiction to try the case. He should have granted the motion for the perpetual stay of proceedings: *Barnum Wire and Iron Works v. Judge*, 59 Mich. 272; *Maclean v. Judge*, 52 Mich. 257; *Hudson v. Judge*, 42 Mich. 248.

The writ of prohibition will therefore be granted.

JUDGMENTS—RES JUDICATA. — As to what constitutes *res judicata*, see *Haines v. Flinn*, 26 Neb. 380; 18 Am. St. Rep. 785, and note; note to *Gould v. Sternburg*, 15 Am. St. Rep. 142; note to *Hawk v. Evans*, 14 Am. St. Rep. 250, 251; *Hooker v. Village of Brandon*, 75 Wis. 8; *Humason v. Lobe*, 76 Tex. 512; *Wernse v. McPike*, 100 Mo. 476; *Bassett v. Connecticut etc. R. R. Co.*, 150 Mass. 178; *Bradley v. Brigham*, 149 Mass. 141; *Foster v. Hinson*, 76 Iowa, 714.

As to what does not constitute *res judicata*, see *Sloan v. Price*, 84 Ga. 171; 20 Am. St. Rep. 354, and note; note to *Hawk v. Evans*, 14 Am. St. Rep. 252.

WALLACE v. GLASER.

[22 MICHIGAN, 190.]

INTEREST, RULE FOR COMPUTING. — In case of partial payments, interest should be computed by applying the payment in discharge of the matured interest, and the surplus, if any, upon the principal, after which interest should be computed on the principal remaining due. If the payment is less than the interest, the surplus thereof must not be added to the principal, but interest must be computed on the former principal until the aggregate payments exceed the interest due, when the surplus must be applied toward discharging the principal, after which interest must be computed on the new principal.

INTEREST, COMPUTATION OF. — Under a statute allowing interest to be computed upon interest after it matures, such computation can continue only until the debt matures, after which simple interest is to be cast upon the principal until the time of liquidation.

E. D. Lewis, for the appellants.

B. D. York and G. R. Lyon, for the respondent.

CHAMPLIN, C. J. Complainant filed her bill of complaint in the circuit court for the county of Ingham, in chancery, to foreclose a mortgage given by defendant Peter Glaser to Lucy Gurney, and by Gurney assigned to complainant. The mortgage was in the usual form, accompanied by a note, and was given to secure the payment of the balance of the purchase price of the mortgaged premises. Joanna Glaser is the wife of the mortgagor, and Peter Linn is a subsequent mortgagee.

The only question in the case is, how the interest should be computed upon the mortgage debt, the amount of the principal being undisputed. The difference in the amount claimed to be due arose solely from a disagreement as to the method of computing the interest. The commissioner to whom the case was referred computed the interest under what is known as the Connecticut rule; that is, he reckoned interest upon the principal up to the liquidation of the indebtedness, and then computed the interest on payments up to the same time, deducting the latter amount from the principal and interest. The rule, as claimed by the complainant and adopted by the circuit court, was the one which is sometimes called the Massachusetts or the United States rule, and was laid down by Chancellor Kent, as follows: "When partial payments have been made, apply the payment, in the first place, to the discharging of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on

the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but the interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance as aforesaid."

This rule was adopted by this court in *Payne v. Avery*, 21 Mich. 524, and is the rule recognized in most of the states. We think that the circuit court was right in its manner of computing interest, and that it reached the right conclusion.

Under the statute (Howell's Statutes, sec. 1599) allowing interest to be computed upon interest after it matures, such computation can continue only until the debt matures, and from that time simple interest is to be cast upon the principal until the time of liquidation.

It follows that the decree of the circuit court must be affirmed, with costs.

INTEREST, RULE FOR COMPUTATION OF. — As to the rule for the computation of interest in the case of partial payments, see *Hart v. Dorman*, 2 Fla. 445; 50 Am. Dec. 235, and note 237-290; *Baker v. Baker*, 23 N. J. L. 13; 75 Am. Dec. 243, and note; *Connecticut v. Jackson*, 1 Johns. Ch. 13; 7 Am. Dec. 471.

INTEREST. — As to whether interest, after maturity, is controlled by the terms of the contract or by statute, see note to *O'Brien v. Young*, 47 Am. Rep. 70-75; *Briggs v. Winemuth*, 10 S. C. 133; 30 Am. Rep. 46, and note 47-50.

HALLGREN v. CAMPBELL.

[82 MICHIGAN, 255.]

OFFICE AND OFFICER — TRIAL OF TITLE TO OFFICE. — Title to office cannot be tried in an action of replevin for property belonging to the office.

OFFICE AND OFFICER — REMOVAL. — Where an officer is appointed for a fixed term, and the power of removal is not expressly declared by law to be discretionary, he cannot be removed except for cause; and when cause must be assigned for his removal, he is entitled to notice and a chance to defend.

OFFICE AND OFFICER — REMOVAL — PRESUMPTION. — A statutory provision that elective officers shall not be removed except for cause does not raise a presumption of intention that appointed officers may be removed without cause.

OFFICE AND OFFICER — REMOVAL — PRESUMPTION. — The legislature may, by express words, confer upon the common council of a city the power to remove an officer without cause; but in the absence of such power given in express words, the presumption is, that the legislature intended

that every officer appointed for a fixed term should be entitled to hold his office until the expiration of such term, unless removed therefrom for cause after a fair trial.

OFFICE AND OFFICER — REMOVAL — OFFICER DE FACTO. — One who has lawfully been in office, and has been recognized as the officer *de facto*, and not lawfully removed, indicates his claim to hold the office by his refusal to deliver up the property, books, and papers belonging thereto; and if he has never yielded, but has continued to act, then a subsequent appointee to the office, who has never had possession, cannot be regarded as an officer *de facto*.

Phillips and Thompson, for the appellant.

B. J. Brown, for the respondent.

CAHILL, J. The plaintiff brought an action of replevin in his individual name against the defendant to recover possession of the following personal property, to wit: "Two iron road-scrapers, one wooden road-scraper, one wooden beam-plow, one wooden tool-box and its contents, consisting of a quantity of shovels and picks, also all notice-books, containing blank notices used by the street commissioner of Menominee City," which he claims belongs to the office of street commissioner of the city of Menominee.

The defendant defends upon the ground that he is himself street commissioner of the city of Menominee, and is therefore entitled to the possession of the property. The defendant claims that on May 6, 1889, he was duly appointed to the office of street commissioner for one year; that he qualified and entered upon the discharge of his duties as such officer, and so continued down to the commencement of this suit. The plaintiff claims, — 1. That the defendant was never legally appointed to the office; 2. That if he was appointed, he was removed by the common council on the fifth day of August, 1889.

The point made against the legality of the defendant's appointment to the office is, that the charter of the city of Menominee provides that "the council shall prescribe the rules of its own proceedings, and keep a record or journal thereof. All votes shall be taken by yeas and nays, and be so entered upon the journal as to show the names of those voting in the affirmative, and those in the negative; and within one week after any meeting of the council, all the proceedings and votes taken thereat shall be published in one of the newspapers of the city": Sec. 8, c. 8.

The record of the defendant's appointment is as follows: "Alderman Spies nominated William Campbell street com-

missioner, seconded by Alderman Oehrling, and he was declared elected."

It is claimed that this record does not comply with the requirements of the charter, and that the appointment is therefore void; and we are cited to *Steckert v. East Saginaw*, 22 Mich. 104.

If we were required in this case to pass upon the title of the defendant to the office which he claims to hold, the case cited would be in point; but we agree with plaintiff's counsel that the title to this office cannot be tried in an action of replevin for property belonging to the office. It is sufficient for the defendant's claim that the common council, having authority to do so, undertook to elect him street commissioner; that he accepted their action, qualified for the office, and entered upon the discharge of his duties, and was recognized by the common council as *de facto* street commissioner. This position would entitle him to the custody of the property in controversy, unless he had been legally removed from office by the common council, or had been in fact removed by the common council, and had acquiesced in such removal, and to the appointment of the plaintiff as his successor.

"A person actually obtaining office with the legal *indicia* of title is a legal officer until ousted": *Board of Auditors v. Benoit*, 20 Mich. 180; 4 Am. Rep. 382.

The first action of the common council for the removal of the defendant was taken at a special meeting called for July 22, 1889, at which the following resolutions were presented and read:—

"Whereas, William Campbell, the street commissioner of the city of Menominee, has graded and graveled a road on the town line, and running from the state road west to the gravel pit, without being ordered by the common council, or without their knowledge, thereby expending a large sum of money without authority, and thereby subjecting the city to needless and uncalled for expense; and

"Whereas, the said William Campbell as street commissioner, as aforesaid, has neglected and refused, and still does neglect and refuse, to obey the orders of the city council in this, to wit, refusing to gravel Ogden Avenue as directed by vote of this council passed at a regular meeting held July 15, 1889,—

"Now, be it resolved that said William Campbell be and hereby is removed from office of street commissioner of said

city, and the office of street commissioner is hereby declared vacant."

Upon a motion being made to adopt this resolution, the mayor stated that he did not think it could be acted upon at this meeting, under the call that had been made, and the matter being referred to the city attorney, he decided that the mayor was right. No action was therefore taken on the resolution at that meeting. At the next regular meeting, held August 5, 1889, the resolutions above quoted were adopted by yeas, seven; nays, two. Immediately following this action, a resolution was adopted appointing Magnus Hallgren, the plaintiff, street commissioner by a similar vote. No notice was given to the defendant of these charges against him, or of the proposed action to remove him from office.

The following provisions of the charter (Local Acts of 1883, pp. 161, 162, 176) bear upon the question of the right of the common council to remove the defendant from office:—

"The following officers shall be appointed by the council, viz., a city attorney, city surveyor, city marshal, city clerk, street commissioner, and engineer of the fire department. The council may also, from time to time, provide by ordinance for the appointment of, and appoint for such term as may be provided in the ordinance, such other officers, whose election or appointment is not herein specially provided for, as the council may [shall] deem necessary for the execution of the powers granted by this act, and may remove the same at pleasure": Sec. 3, c. 5.

"The mayor, city marshal, city clerk, city treasurer, street commissioner, supervisors, and constables shall hold their office for the term of one year from the first Monday in April of the year when elected, and until their successors are qualified and enter upon the duties of their offices": Sec. 5, c. 5.

"Any person appointed to office by the council by authority of this act may be removed therefrom by a vote of the majority of the aldermen-elect, and the council may expel any alderman, or remove from office any person elected thereto, by a concurring vote of two thirds of all the aldermen-elect. In case of elective officers, provision shall be made by ordinance for preferring charges, and trying the same, and no removal of an elective officer shall be made unless a charge in writing is preferred, and an opportunity given to make a defense thereto": Sec. 17, c. 8.

It is claimed by the plaintiff that under this last provision

of the charter the common council had a right to remove the defendant from the office of street commissioner without notice to him. In *Mead v. Treasurer*, 86 Mich. 416, this court said: "Our state system favors appointments for fixed periods, and almost entirely rejects the policy of removals at will."

We shall need to find in the charter of Menominee clear and unequivocal power vested in the council to remove this officer without notice, before we can concede that any such power exists. In 1 Dillon on Municipal Corporations, section 250 (188), it is said: "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing."

In Mechem on Public Officers, section 454, it is said: "In those cases in which the office is held at the pleasure of the appointing power, and where the power of removal is exercisable at its mere discretion, it is well settled that the officer may be removed without notice or hearing."

In support of this position, both of these learned writers cite the case of *Ex parte Hennen*, 18 Pet. 230, and upon this case most of the later cases have been based. That was the case of a clerk of the district court of the United States for the eastern district of Louisiana. He had been removed from office by the district judge without other cause than the desire of the judge to supplant him with a personal friend. The court held that as the law vested in the judge the appointment of a clerk, and as such appointment was not for any fixed term, the power of appointment necessarily carried with it the power of removal. The main ground of the decision was, that it could not be admitted that it was the intention of the constitution that such an office should be held during life. We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and wherever cause must be assigned for the removal of the officer, he is entitled to notice, and a chance to defend: *Field v. Commonwealth*, 32 Pa. St. 478; *State v. City of St. Louis*, 90 Mo. 19.

It is claimed on behalf of the plaintiff that because section 17 of chapter 8 of the charter provides expressly that elective officers shall not be removed except for cause, it is to be presumed that the legislature intends that appointed officers might be removed without cause. We are not disposed to al-

low any presumption to aid the exercise of such arbitrary power. In such a case, the legislature may, by express words, confer upon the common council of a city the power to remove an officer without cause; but in the absence of such power, given in express words, the presumption must be that the legislature intended that every officer appointed for a fixed period should be entitled to hold his office until the expiration of such period, unless removed therefrom for cause after a fair trial. This presumption is strengthened when we compare section 17 of chapter 8 with section 3 of chapter 5, before quoted. In the latter section, certain officers are declared to be removable at pleasure, and although the street commissioner is expressly named in that section, he is not included among those who may be so summarily removed.

But it is claimed by plaintiff that he has, since his appointment, been acting as street commissioner, and is therefore *de facto* such officer. There could not be two incumbents of this office. The defendant, by his refusal to deliver up the property, books, and papers of the office, has indicated that he claimed to hold the office. If he was once lawfully in office, a fact which we are not allowed to question on this record, and has never yielded, but has held on and continued to act, then the plaintiff has never gotten possession, and cannot be regarded as an officer *de facto*: *Mead v. Treasurer*, 86 Mich. 419.

The judgment of the court below was in accordance with these views, and is affirmed, with costs.

OFFICE AND OFFICER.—REMOVAL OF OFFICERS.—As to the power of the legislature to remove officers from office, or to delegate such power to the governor, see *People v. Stuart*, 74 Mich. 411; 16 Am. St. Rep. 644, and particularly note 647, 648. The governor cannot himself enlarge his own power respecting the removal from office of public officers, nor can the legislature itself deprive a duly appointed or elected officer of his right to hold office, except by due process of law: *Malesier v. Therrien*, 80 Mich. 187. Compare *Board of Aldermen v. Darrou*, 13 Col. 460; 16 Am. St. Rep. 218.

BUSCH v. WILCOX.

[32 MICHIGAN, 232.]

PRINCIPAL AND AGENT—ADOPTION OF CONTRACT—LIABILITY OF PRINCIPAL.—One dealing with an authorized agent is bound to inquire and ascertain the extent of his authority. A principal is bound by all acts of the agent within the scope of his authority.

IF A PRINCIPAL ADOPTS THE CONTRACT OF A SELF-CONSTITUTED AGENT who has assumed to act for him without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf. He is bound by all acts within the scope of the assumed authority of such agent. His liability extends to the frauds and misrepresentations of the agent committed or made while acting within the scope of the real or assumed authority.

George A. Wilcox, in pro. per., and John D. Conely, for the motion for a rehearing.

CHAMPLIN, C. J. An opinion was handed down in this case October 10, 1890, and the defendant has moved for a rehearing, based upon errors of fact and law. The defendant in person has furnished reasons for a rehearing, in which he states there are several misapprehensions and misstatements of facts as proved upon the trial.

And first he calls attention to the purchase price paid by him for the legal title to the lands purchased by him from Remick. He states that the record shows that he paid Remick four thousand dollars, and allowed McKay one third of the net profits to be made on the purchase for his interest, and also paid him one thousand dollars cash bonus in addition. In this the defendant is correct; but as the amount paid by defendant for the land was not involved in the issue, it was not stated in the opinion.

2. He shows that the court was in error in stating that "Remick had an estimate of the pine timber on the lands made by Robinson and Flynn, which showed that the land contained about four million feet of pine."

The record shows, both from the testimony of Mr. Hall and of Mr. Wilcox, that the Robinson and Flynn estimate was made after the purchase by Mr. Wilcox. Mr. Wilcox testifies that when he purchased he interviewed both McKay and Remick, and each assured him that the land was good for five million, and a few months after he bought he employed Robinson and Flynn to estimate the pine, and they did so. He testifies: "I told them I had purchased that land, and would like to know what there was as near as I could."

This estimate was the one which Hall had with him when he had his interviews with Busch, and showed that their estimate was three million seven hundred and seventy thousand feet. This estimate he got from Wilcox. Hall also had Van Riper make an estimate, and that showed the quantity of pine to be five million one hundred and sixty-two thousand feet. It is freely admitted that the court was laboring under a misapprehension when it stated in the opinion that "Remick had an estimate of the pine timber on the lands made by Robinson and Flynn, which showed that the land contained about four million feet of pine."

Mr. Wilcox contends that "the effect of these misapprehensions of the facts is prejudicial to the good faith of the initial purchase having been made on the basis of five million feet, and the subsequent holding and dealing with the lands on this basis, supported by Van Riper's estimate, subsequently made. It is submitted [says Mr. Wilcox] that even if these misstatements of fact do not materially affect the final judgment of this court, it is due to the defendant that they should appear correctly in the opinion and published report."

We think the defendant is entitled to have it appear that when he purchased he was told by McKay and Remick that the land was good for five million feet of pine, and that he relied upon such statement; and that after he purchased he had a desire to know what there was on the land, and procured Robinson and Flynn to estimate the pine, and that they did so, and that their estimate showed him that there was three million seven hundred and seventy thousand feet of pine upon the land. We think these facts can only have a bearing upon the issue, when considered in connection with what was said and done, and the use made of this estimate by Hall in his interviews with Busch.

The third reason assigned for a rehearing by the defendant is mainly an argument upon the facts, and if addressed to the jury, or if we could decide upon the facts, would not be without great weight. But we cannot reverse a case upon disputed facts, however much we might feel that they impressed us differently from what they did the jury. Now, we might infer and find from the testimony that Busch relied exclusively upon the guaranty of Mr. Hall as to the quantity of pine and of Van Riper's estimate. The testimony is very strong in that direction. But Busch also testifies that he relied upon the representations made by Mr. Hall, and we cannot say that he

did not rely upon both. It does not seem to us that because he would not have entered into the contract without Hall's guaranty, such fact was a waiver of his right to rely upon the prior representations made by Hall, whatever may have been the value of such verbal guaranty in a legal point of view.

The defendant, Wilcox, further insists that "the contract having been made and sent to Wilcox for his adoption, without any intimation of there being anything outside of the written contract to which he was committed by signing it, Wilcox at least was entitled to be apprised of these facts immediately upon his coming personally into his relations of principal with Busch."

In other words, if we understand the proposition correctly, it is asserted that when one enters into a contract with a self-constituted agent who has no authority to act for another, and the person for whom the self-constituted agent assumes to act adopts the contract so made in his name and behalf, thereupon it becomes the duty of the person so treating with the self-constituted agent immediately to notify or inform the principal of the instrumentalities made use of by such self-constituted agent to induce him to enter into the contract. In a case where such contracting party is free from fraud or collusion, and acts in good faith, we do not perceive that such duty is imposed upon him. He has no right to presume that the self-constituted agent has misrepresented facts to him, or that he intends to defraud him. On the contrary, we think it is the duty of the principal, or the person who becomes so by adopting the contract made in his name and for him, to make all needed inquiry and investigation into the facts, acts, and representations of the person who, without authority, has assumed to act for him before he adopts the contract as his own. For in adopting the contract he not only adopts it as written, but he thereby adopts as his acts all the instrumentalities of the self-constituted agent in obtaining the consent of the opposite party to enter into the contract. By adopting the acts of the self-constituted agent, he seeks to appropriate to himself all the benefits to be derived from it as fully as if he had himself induced in the first instance, and with this he must assume all the liabilities which attach to it: *Wilson v. Tammam*, 6 Man. & G. 236; *Mores v. Ryan*, 26 Wis. 356; *Kerr on Fraud and Mistake*, 111; *Bigelow on Fraud*, 367; *Broom's Legal Maxims*, 708; *Wharton on Agency*, secs. 89, 90; *Fitzsimmons v. Joslin*, 21 Vt. 142; 52 Am. Dec. 46; *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y.

283; *Elwell v. Chamberlin*, 31 N. Y. 611; *Presby v. Parker*, 56 N. H. 409; *Garner v. Mangam*, 93 N. Y. 642; *Bennett v. Judson*, 21 N. Y. 238; *Carpenter v. Insurance Co.*, 1 Story, 57; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; *Coleman v. Stark*, 1 Or. 115. The point made by Mr. Wilcox need not be discussed further, inasmuch as it was not raised in the court below.

Counsel for defendant has placed in our hands a printed argument, in which he gives the reasons why a rehearing should be granted. Upon one point, he stands with the court upon common ground, which is accurately and tersely stated by him as follows: "In this case there can be no question but that the contract must now be treated as the contract of Mr. Wilcox. He adopted it. He made payments upon it, and he has brought suit upon it."

This leaves the only real contention between counsel and the court, the question of the extent of the liability of a principal who becomes such by adopting the unauthorized act of a self-constituted agent. We quote from his argument as showing precisely the position of counsel. He says: "I want to emphasize the fact that at the time Mr. Busch was informed that Mr. Hall had no authority to speak in relation to the quantity or quality of the pine, the negotiations were still pending, and not concluded; and the fact that when Mr. Busch signed the writing he knew that the representations made by Hall were outside of any authority that he (Hall) might exercise, or might assume to exercise. And I want to emphasize the additional fact that Mr. Hall's personal guaranty was not given in addition to representations made within the scope of authority, but Mr. Hall's personal guaranty was given because his representations were without authority, and Mr. Busch knew it."

Grant that Busch knew that Hall had no authority from Wilcox to enter into any contract to lumber the land, and also that Wilcox had not theretofore authorized him to make any representations in relation to the quantity and quality of the timber, still, he did not know that Hall assumed to act as the agent of Wilcox in making the contract, — that he assumed to act for him in executing the contract, — and the question recurs, When Wilcox adopted the contract and made it his own, did he not also adopt as a legal consequence the agency of Hall to its full extent, as to inducements held out by him, and in reliance upon which Busch entered into

the contract? We have already stated what we consider to be the law upon this proposition, and referred to some of the authorities by which we think it is supported.

Counsel for defendant also says: "It is stated in the opinion of the court that Hall, Wilcox, and Noyes and Sawyer were acting in concert, and not each one for his separate and individual interest, but as a whole. There is no testimony to that effect; but, on the contrary, the testimony is, that Mr. Wilcox did not act at all. There is no act of Mr. Wilcox in this case of any sort prior to the reception of the written bargain. That Hall and Sawyer acted in concert is true, but that Wilcox acted is untrue."

We did not attempt to state the testimony from which we deduced the statement referred to; but we think counsel must have overlooked the testimony which Mr. Wilcox gave, as follows: "There was a contract, I believe, that we should put in a part of this timber that coming winter."

The point, however, is not very important, as we are content to rest our opinion upon the obligations and liability of Mr. Wilcox, arising from his adopting the contract made by Hall as his agent, and the paramount duty of Wilcox to ascertain the extent of the authority assumed and the means employed by Hall in making the contract. The law, as we conceive it to be, is this: When a person deals with an authorized agent, he is bound to inquire and ascertain the extent and limit of his authority to bind the principal, and the principal is bound by all acts of the agent within the scope of his authority; and when a principal adopts the contract of a self-constituted agent who has assumed to act for such principal without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority; and in both cases the liability of the principal extends to the frauds or misrepresentations of the agent committed or made while acting within the scope of the real or assumed authority. We entertain no doubt upon the law that should govern the case.

Upon the facts as they are developed by the testimony, we regard it as a close case, and viewed from Mr. Wilcox's standpoint, it is in some respects one of apparent hardship. But we cannot treat the facts differently from what the jury have found them to be upon the whole testimony; and the court in

his charge — which was not excepted to, nor was error assigned upon that portion of it — instructed the jury that as Mr. Wilcox had commenced suit against Busch for damages for not performing the contract, they could not in this suit allow Wilcox anything for failure to perform. His remedy against Busch is therefore left intact for any overpayment, or breach of contract on Busch's part.

We see no reasons for coming to a different conclusion than that first announced, and the rehearing is denied.

AGENCY — LIABILITY OF PRINCIPAL — RATIFICATION. — Every one is bound to inform himself with whom he is dealing, and he deals with an agent at his peril, unless he informs himself of the extent of his authority: *Bond v. Pontiac etc. R. R. Co.*, 62 Mich. 643; 4 Am. St. Rep. 885, and note. As to third persons, a principal is bound by the acts and representations of his agent made and done within the apparent scope of his authority; and his actual instructions do not govern, unless the person dealing with him had notice of or was put upon inquiry as to his real authority: *Wachter v. Phoenix Assur. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600, and note; and this principle applies even to acts of an agent fraudulent in their nature, done in the scope of his authority: *Du Souchet v. Dutcher*, 113 Ind. 249. The principal's ratification of the unauthorized acts of one assuming to act for him as his agent must be *in toto*; he must take the responsibility as well as the benefit that may result from such acts: *Shoninger v. Peabody*, 57 Conn. 42; 14 Am. St. Rep. 88, and note; note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 110-114; *Johnston H. Co v. Miller*, 72 Mich. 265; 16 Am. St. Rep. 536.

WILBUR v. STOEPER.

[82 MICHIGAN, 344.]

CORPORATIONS — CONTRACT BY PART OF STOCKHOLDERS. — An agreement between two of the three stockholders and directors of a corporation, that a purchaser of stock shall be employed as business manager for a term of years, and for the repurchase of his stock at a stated price if he desires to retire at the end of the term, is inseverable, and void as against public policy, unless assented to by all the stockholders.

PRACTICE — RIGHT TO EXCEPT TO INSTRUCTIONS. — Litigants cannot be deprived of their right to except to instructions by the court, unless they have expressly requested them. Requests by implication are unknown.

CONTRACTS — KNOWLEDGE AND ASSENT. — In order to make a contract valid which would be void without the consent of all the stockholders of a corporation, there must be evidence that they had knowledge that it was to be made, and that they assented.

PRACTICE — INSTRUCTIONS. — Where there is evidence tending to support both sides of an issue of fact, an instruction thereon should call attention to both classes of the evidence.

CONTRACTS — PAROL EVIDENCE TO SHOW EXECUTION. — Conversations and negotiations preliminary to a written agreement, although merged in it,

may still be admissible, not to explain its terms, but to throw light upon the question of its execution, or other questions connected therewith.

PRACTION — EVIDENCE — BURDEN OF PROOF. — When the execution of an instrument sued on is denied by affidavit, the burden of proof is upon the plaintiff throughout the trial, to show the execution of the instrument. This in Michigan, under circuit court rule 79.

CONTRACTS. — DELIVERY, WHICH IS AN ESSENTIAL PART of the execution of an instrument, cannot be inferred from possession.

CONTRACTS, EVIDENCE TO REBUT. — An unsigned memorandum of an agreement drawn previous to the contract sued on is not admissible as rebutting evidence.

Charles K. Latham, F. A. Baker, and Edward W. Pendleton,
for the appellants.

Parker and Burton, and Alfred Russell, for the respondent.

GRANT, J. This suit was brought upon the following written agreement:—

"In consideration of the undertakings of De Witt E. Wilbur, in connection of the Stoepel Lumber Company, and as part of the contract for the sale of ten thousand dollars of the capital stock of said company by us to him, we hereby agree that if at the end of two years he decides to withdraw from said company we will repurchase the stock he buys of us, or so much of it as he may then have, for cash, at eighty per cent of its par value; and if at any time during the first two years the said company dispenses with his services, we agree to buy back the stock, on the same terms as above stated; but in either case we stipulate to have three months' time in which to take and pay for the same.

WILLIAM C. STOEPPEL.

"April 1, 1884.

JOSEPH E. WATSON."

The first declaration filed in the case set forth the above agreement *in hæc verba*, and alleged that the defendants were large stockholders in the Stoepel Lumber Company; that they were desirous of selling four hundred shares of its capital stock to plaintiff, and that he should become manager of the business; that he agreed to become a member of the corporation, and manager of its business, and that thereupon the above written contract was executed. The contract was not made with the company, but with two of its stockholders. One Herman R. Stoepel was also a large stockholder. This declaration did not allege any contract with him, verbal or written, nor any consent on his part to the agreement sued on, nor did his name appear in the declaration. Issue was

duly joined, and the case came to trial. Upon that trial there was no evidence of consent on the part of Herman R. Stoepel to the agreement, and the court held that the contract was void as against public policy, and thereupon the plaintiff withdrew a juror.

Plaintiff then filed an amended declaration, in which he alleged that the two Stoepels and Watson, on March 26, 1884, owned a saw-mill and the land on which it was situated, and that he owned a stock of goods; that they proposed to him to organize a corporation with a capital stock of fifty thousand dollars, the above property to be turned over to the corporation, and plaintiff to pay in a certain amount in money; that they proposed to make him manager, with a salary of fifteen hundred dollars, to give him ten thousand dollars' worth of the capital stock, and to agree in writing that if at the end of two years he should desire to withdraw from the company they would purchase his stock at eight thousand dollars; that the formal organization was completed; that before he had transferred his stock of goods to the corporation, Herman Stoepel refused and declined to join in making the written agreement, and that thereupon the defendants by themselves, and without said Herman, made said written agreement. The declaration is entirely silent as to any assent to the agreement, except the alleged verbal promise to make such an agreement, which it is alleged he refused to carry out. Issue was joined, and upon the second trial, verdict and judgment were rendered for the plaintiff.

1. This alleged agreement between the defendants, who owned a majority of the stock, and the plaintiff, is contrary to public policy, and void as against those not consenting to it. The defendants were directors, and in the management of the corporate affairs cannot but be unduly influenced by such an agreement. Their natural desire and inclination would be to continue the plaintiff as manager, although it were against the interest of the other stockholders, and would be against their own as stockholders, but for the agreement which might render them liable for the payment of a large sum if they failed to retain him. Nor is such contract made valid by the good faith of the parties to it. Its effect upon stockholders who are not parties to it, or do not consent to it, is the same in the one case as in the other. The law therefore wisely condemns and prohibits all such contracts. The supreme court of the United States has so decided in a recent

case, under facts very similar to the case at bar: *West v. Camden*, 135 U. S. 507, and authorities there cited.

The pivotal question in the case therefore was, whether Herman R. Stoepel consented to the agreement. The learned circuit judge charged the jury that the agreement upon its face was void, but that there was evidence in the case that Herman did consent to it, and if he did, the plaintiff was entitled to recover. The learned counsel for plaintiff seem to admit in their brief that there was no such evidence, but insist that defendants cannot complain, because their counsel admitted there was, by asking the court to instruct the jury that plaintiff could not recover unless they found that Herman consented to the agreement. We do not think this warranted the judge in charging that there was evidence, if such was not the fact. The establishment of such a rule would require greater care and caution on the part of counsel in the trial of causes than can well be exercised, and would often result in the defeat of justice. Litigants cannot be deprived of their right to except to instructions by the court, unless they have expressly requested them. Requests by implication are not known.

A careful examination of the evidence is therefore necessary, in order to determine whether this instruction was correct. The allegation in the declaration that Herman R. Stoepel made a verbal promise to make such an agreement, is not sustained by the proof. On the contrary, by plaintiff's own evidence, he expressly refused from the beginning to make any such agreement. The agreement sued on was signed by defendants April 14th, although dated April 1st, as the latter was the date from which the operations of the corporation were to commence. Herman was not then present, and if any consent was given by him which was binding upon him, it was given before April 14th. This depends upon two conversations testified to by plaintiff, one in February, and the other on March 26th, when the articles of association were signed. He testified that defendants read and offered to him a proposition to buy back his stock should he withdraw at the end of two years, or should the company decide to dispen-
se with his services. This proposition was unsigned. When first read, defendants and plaintiff alone were present. It was read again when Herman was present, and he said: "That is all right, Mr. Wilbur, only I have not enough interest in it to guarantee it myself. Mr. Watson and brother Will

here can do so if they like. I have no objections, but I have not money enough in it so that I would agree to it."

When the articles of association were signed, plaintiff says that the question of this contract was brought up again, and there was some talk about it, and Herman said, as before, that "he had not enough in it so that he cared to sign it, but he had no objection to Mr. Watson and W. C. Stoepel making that contract."

The above is the testimony of plaintiff upon the last trial. Upon the first trial he testified as follows, referring to the conversation of March 26th:—

"Q. How did it happen that Herman R. Stoepel did not sign this paper?

"A. At the time we were talking of this, at the time of the signing of it, H. R. Stoepel withdrew from the room. As he went out he beckoned to W. C. Stoepel. W. C. Stoepel went out with him. W. C. Stoepel returned, but H. R. Stoepel did not. W. C. Stoepel said that H. R. Stoepel objected to signing the paper. Then Mr. Parker, who was doing my business for me, said: 'The business is all up, unless Mr. Wilbur is willing to go on without any such guaranty.' I stated that I was not willing. Joseph E. Watson said: 'Will, you and I might make a contract with him, if he is willing to accept it.'"

Plaintiff admitted on the second trial that the above transaction occurred when the articles of association were signed, and not when the contract to repurchase the stock was signed. It is clear, therefore, from this record that up to the meeting of March 26th, when the articles of association were executed, plaintiff wished to obtain Herman as a party to the contract of guaranty; that he was then unwilling to consummate the arrangement unless this was done; that no such contract was at that time made with defendants until after Herman had left; that plaintiff had never expressed to Herman his willingness to take the guaranty from defendants alone; that no intimation was made to Herman at the meeting, or at any other time, that any such contract was contemplated between plaintiff and defendants; and there is no evidence that Herman had any knowledge of the existence of such a contract until May afterwards, when he says Parker presented it to him for signature. Upon what principle can Herman R. Stoepel be held to have consented to a contract which he had never been informed was in contemplation? In order to make such a contract valid, which would be void without the

consent of all the stockholders, there must be evidence that they had knowledge that it was to be made, and that they assented.

There is a further error in this instruction of the court. If there was evidence of consent, he should also have instructed the jury that there was evidence of non-consent. Such a statement from the judge, without calling the attention of the jury to the contrary evidence, certainly has a tendency to unduly influence them, and to give undue prominence to plaintiff's evidence. The testimony on the part of the defendants was certainly very strong that no such consent was given.

2. It is insisted by plaintiff's counsel that this contract was severable; that the contract to repurchase the stock after two years was independent of the agreement that the company should employ the plaintiff as manager; that the latter clause was fulfilled; that the former clause was not performed, and was enforceable in the present action. They cite, as sustaining this proposition, *Seymour v. Detroit etc. Rolling Mills*, 56 Mich. 117. That case is not the parallel of the one at bar, and a careful examination convinces us that it does not sustain the proposition. In that case the contract was made with the defendant corporation, while in this the corporation had nothing whatever to do with the alleged contract. One of the material considerations for this contract was the agreement that plaintiff should be employed by the corporation as its manager. It is evident that but for this he would not have entered into the contract, and he so testifies. This, if void as against public policy, taints and vitiates the whole contract, and both law and equity provide no remedy for either party, but leave them in such a position as they have voluntarily placed themselves in.

3. There are other exceptions which, in view of the probability of a new trial, should be noticed. At the expiration of the two years, plaintiff gave notice of his withdrawal, tendered his stock to defendants, and demanded that they repurchase. They desired him to continue his employment. He was unwilling to do so, but finally did, upon the execution of the following memorandum:—

"It is hereby agreed between the parties hereto as follows:—

"Whereas, the Stoepel Lumber Company has this day agreed to employ De Witt E. Wilbur as manager, under the

provisions of a certain contract dated this twenty-third day of April, 1886,—

"Now, therefore, in consideration of the advantage to us as stockholders of said company by reason of such employment, we agree that it shall make no change whatever in the mutual rights and responsibilities between said Wilbur and ourselves, made by contract of April 1, 1884, with reference to the repurchase of stock in said company, nor shall it affect any action taken thereunder.

"Dated this twenty-third day of April, 1886.

"W. C. STOEPHEL.

"JOSEPH E. WATSON."

As to the effect of this memorandum, the court instructed the jury as follows: "That memorandum was made on the twenty-third day of April, 1886, whereby they agreed to further employ Mr. Wilbur, and that memorandum, gentlemen of the jury, is signed by William C. Stoepel and Joseph E. Watson. If William C. Stoepel and Joseph E. Watson knew of the condition of this former contract of April 1, 1884, the paper in evidence would estop them, and you will have to determine what the fact in that regard is. William C. Stoepel, when upon the stand, said that the paper was left there; he did not do anything with it, and was not aware, I think the testimony is, that Herman R. Stoepel did not sign it. If he was not aware of that fact, and did not know the exact condition of this paper, then there could be no estoppel; while, on the other hand, if he knew this at the time it was executed by himself and Mr. Watson, that would operate in the law as an estoppel."

The contention on the part of the defendants was, that they signed the agreement with the understanding and upon the condition that Herman was to sign it also; that they left it with Parker to deliver when signed by him; and that at the time of making the said memorandum they supposed that it was signed by him, and to that effect was their testimony. In view of these facts, the charge was correct. The memorandum spoke of a contract made, executed. If defendants used this language with a full knowledge of all the facts, they are certainly estopped from denying the execution of the contract.

4. The conversations and negotiations preliminary to the agreement, although merged in it, were still admissible, not for the purpose of explaining its terms, about which there was no doubt, but for the purpose of throwing light upon the ques-

tion of the execution of the contract, and other questions connected therewith. The rulings of the court in this respect were correct.

5. Each of the defendants filed an affidavit with his plea, denying the execution of the contract. The court charged the jury that the burden of proof was on the defendants to show that the contract was not executed. In this the court clearly erred. Whenever the execution of an instrument sued on is denied by affidavit under circuit court rule 79, the burden of proof is upon the plaintiff to show the execution of the instrument. No instrument is executed until delivered. In such case, delivery, which is an essential part of the execution, cannot be inferred from possession. The burden of proof remained throughout the trial upon the plaintiff.

6. The court admitted an unsigned memorandum of an agreement drawn up by Parker previous to the contract sued on as rebutting testimony. He testified that it was drawn pursuant to instructions or conversations, but from whom or with whom does not appear. Its admission was error. It was wholly incompetent and immaterial.

Judgment reversed, and new trial ordered.

CONTRACTS IN WRITING — PAROL EVIDENCE. — As to when parol evidence may and may not be admitted to explain or throw light upon a written contract, see *Gilbert v. Stockman*, 76 Wis. 62; 20 Am. St. Rep. 23, and note.

CORPORATIONS — SHARE-HOLDERS. — A subscriber to corporate stock cannot be released except by the consent of all the other subscribers: *Cartwright v. Dickinson*, 88 Tenn. 476; 17 Am. St. Rep. 910. As to conditions and contemporaneous agreements relieving the liability of subscribers for unpaid subscriptions, see note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 823, 824; *Oravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298.

CORPORATIONS — RATIFICATION. — To effect a valid ratification by a corporation of an act or contract made for it without the proper authority, it must appear that the corporation knew the whole nature of the act or contract, and gave its consent thereto: *Bliss v. Water etc. Co.*, 20 Cal. 602; 81 Am. Dec. 132, and note.

FERGUSON v. GIES.

[82 MICHIGAN, 252.]

CIVIL RIGHTS — DISCRIMINATION BECAUSE OF COLOR. — Under the common law and the statutes of Michigan, the keeper of a public restaurant cannot discriminate against a colored person as to the part of the building in which he shall be served, solely on account of his color. In a suit to recover damages, the colored person thus discriminated against need not declare upon nor refer to the statute.

CIVIL RIGHTS — DISCRIMINATION BECAUSE OF COLOR. — In Michigan, there is an absolute, unconditional equality of white and colored persons before the law in all public places, and a discrimination in such place against a colored man, solely on account of his color, is a ground for the recovery of civil damages.

DAMAGES. — IF A STATUTE IMPOSES UPON ANY PERSON a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty he is liable for any injury or detriment caused thereby, if the injury so caused is of the kind the statute was intended to prevent.

D. A. Straker, for the appellant.

William Look and H. F. Chipman, for the respondent.

MORSE, J. The defendant, at and before the time this suit was brought, was the manager of a public restaurant in the city of Detroit, and was licensed by that municipality to conduct such public restaurant. It was, to all intents and purposes, a public place. On August 15, 1889, the plaintiff, a colored man, in company with a friend, entered this restaurant, and sitting down at one of the tables provided for that purpose, ordered supper. The plaintiff claims, in substance, that the restaurant was divided in two parts, not separate rooms, but one side or part of the room was known as the "restaurant side," and the other as the "saloon side." The restaurant side was furnished with tables covered with table-cloths. Glasses were on the tables, with napkins in them, and there was an electric fan over the tables. The tables had a very neat appearance. The tables on the saloon side were furnished with beer-glasses, and were beer-tables such as are usually found in saloons. The plaintiff testifies that he and his friend sat down on the restaurant side, at the first table from the last in the second row, and called for a lunch. The waiter said: "I can't wait on you here." Ferguson said: "What do you mean by that?" The waiter replied: "We cannot serve you kind of people here. It is against the rules of the house to serve colored people in the restaurant. If you want anything to eat, you will have to go on the other side of the house."

After waiting a few minutes, Ferguson went to the office, and said to the defendant: "Mr. Gies, I came into your restaurant with a friend, and I have been insulted by one of your waiters," and told him what the waiter had said. Gies replied: "That is all right. That is the rule of this house, if you want anything to eat."

They had some conversation, which ended by defendant saying to plaintiff that he would get nothing to eat unless he went on the other side. Plaintiff asked if he could not sit at the table adjoining, or at any of the tables behind him, which were empty, but the defendant refused to serve him at any of the tables on that side of the room. Plaintiff went away without eating anything. While he was sitting at the table, several white persons came in, sat down, and had refreshments at different tables on the restaurant side of the house.

The defendant admits that he refused to serve refreshments of any kind to the plaintiff at the table where he sat, for no other reason than that Ferguson was a colored man, and that he said to him: "That is the rule of the house. We cannot serve colored people right at those certain tables." But he testifies that he further said: "Ferguson, there is no use in your waiting here. We cannot serve you at these tables. If you will sit over at the next table in the other row, I will see that you are served there all right, the same as any other person will be."

Ferguson said, "No." There was about six feet between the two rows of tables. Defendant admits also that there was a difference in the tables, being of different shape; that the tables at which he told Ferguson he might be served were at the time uncovered, and that the covers were taken off to accommodate the crowd that came in for beer, but testifies that he told plaintiff he would cover the table, and furnish it the same as the one he was sitting at, and that he should be waited upon and served the same as those on the other side of the room. Defendant denies that this was in the saloon part of his place. He says it was a part of the restaurant, but situated in a more private place, as the bar would hide them from the view of those in the front part of the place. There was no partition between the tables. They were in the same room, and divided only by space. Colored people were not permitted to sit except in one part of the room, but white men were served wherever they liked.

The circuit judge, Hon. George Gartner, instructed the
AM. ST. REP., VOL. XXI.—57

jury that the plaintiff was entitled, under the law, to full and equal accommodations at this restaurant with all other citizens; that "all citizens, under the law, have the same rights and privileges, and are entitled to the same immunities,—it makes no difference whether white or colored. A different idea or principle than this never rested in reason. The reasoning of Chief Justice Taney, in his opinion in the Dred Scott case, is now largely and almost universally regarded as fallacious and contrary to the principles of law then claimed to exist. The emancipation of the slaves followed, and then the Fifteenth Amendment placed the colored citizen upon an equal footing in all respects with the white citizen. Since then, in many of the states, laws have been enacted to modify and overcome the prejudices entertained by many of the white race against the colored race, and to place the latter upon an equal footing with the former, with the same rights and privileges. Thus the legislature of this state, in 1885, passed a law with that object and for that purpose; and in certain instances a denial of such rights is made a crime under the law of this state."

He further said to the jury that if they found that the plaintiff was denied full and equal accommodations, the defendant was liable in damages for such denial. So far, the learned judge was eminently sound in his reasoning, and correct in his law; but in his application of the law to this particular case he was in error. The jury, under the defendant's own version of the transaction, should have been instructed to find a verdict for the plaintiff.

In his definition of "full and equal accommodations," the court said: "It is claimed by the defendant that he did not refuse to serve the plaintiff, but told him, substantially, that he would not serve him on that side of the house; but that if he would go over and take a seat at a table on the other side of the room in the restaurant, he would then serve him in precisely the same manner in which he would be served at the table at which plaintiff had seated himself; and that the rule of the house was, not to serve colored persons on that side of the house. Now, gentlemen, the defendant would not have the right to refuse to serve the plaintiff in the restaurant proper; but it is claimed by the defendant that the saloon portion is divided from the restaurant, and that the table at which he requested the defendant to sit was in the restaurant. While the defendant had no right to make a rule providing

for an unjust discrimination, still, he would have the right, under the law, to make proper and reasonable rules for the conduct of his business, and governing the conduct of his patrons; and whether this was a reasonable rule, I will submit to you for determination. Thus the defendant has the right to reserve certain portions of his business for ladies, and other portions for gentlemen, while he may also reserve other portions for his regular patrons or boarders. He might also, under the law, reserve certain tables for white men, and others where colored men would be served, providing there be no unjust discrimination. And this brings me to an explanation of the term which I have used, viz., 'full and equal accommodations.' By this term, 'full and equal,' is not meant identical accommodations, but by it is meant substantially the same accommodation. A guest at a restaurant has no more right to insist upon sitting at a particular table than a guest at a hotel has the right to demand a particular room, as long as the accommodations offered are substantially the same. This is all the law demands and requires, and if you find from the evidence in this case that the defendant offered to serve the plaintiff in one part of the restaurant proper, in the same manner as guests were served in other parts, and that he offered the plaintiff full and equal, although not identical, accommodations, and if you find that the rule made by the defendant did not make an unjust discrimination, but was reasonable, then your verdict must be for the defendant."

Under this charge, the jury found for the defendant. The fault of this instruction is, that it permits a discrimination on account of color alone, which cannot be made, under the law, with any justice. As far as it relates to the right of a restaurant-keeper to make rules and regulations based upon other considerations, the charge is of no concern in this case, and we shall not express any opinion as to its correctness. But in Michigan there must be, and is, an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that are denied to the black man. Socially, people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people, on account of their color alone, which the law will sanction.

We have been cited to a large number of cases upholding

the doctrine enunciated by the trial judge. It has been held that separate schools may be provided for colored children, if they are reasonably accessible, and afford substantially equal educational advantages with those provided for white children: *State v. McCann*, 21 Ohio St. 198; *Bertomeau v. Directors*, 3 Woods, 177; *Ward v. Flood*, 48 Cal. 36, 45; 17 Am. Rep. 405; *Cory v. Carter*, 48 Ind. 327; 17 Am. Rep. 738; *Roberts v. Boston*, 5 Cush. 198; *People v. Easton*, 13 Abb. Pr., N. S., 159; *Dallas v. Fosdick*, 40 How. Pr. 249; *United States v. Buntin*, 10 Fed. Rep. 730; *People v. Gallagher*, 93 N. Y. 438; 45 Am. Rep. 332. It has also been held that common carriers may provide different cars or separate seats for white and colored persons, if such cars or seats are equal in comfort and safety one with the other: *West Chester etc. R. R. Co. v. Miles*, 55 Pa. St. 209; 93 Am. Dec. 744; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis etc. R. R. Co.*, 23 Fed. Rep. 318; *Chesapeake etc. R. R. Co. v. Wells*, 85 Tenn. 613; *Murphy v. Western etc. R. R. Co.*, 23 Fed. Rep. 637, 640; *Chicago etc. R'y Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641. In *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62, this same principle was recognized; but it must be remembered that the decision, as in the case of *Roberts v. Boston*, 5 Cush. 198, was made in the *ante bellum* days, before the colored man was a citizen, and when, in nearly one half of the Union, he was but a chattel. It cannot now serve as a precedent. It is but a reminder of the injustice and prejudice of the time in which it was delivered. The negro is now, by the constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place the black man has also, because of such citizenship.

But this is not all. In 1885, the legislature of this state, by act No. 130, enacted, —

"Sec. 1. That all persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber-shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.

"Sec. 2. That any person who shall violate any of the provisions of the foregoing section, by denying to any citizen, except for reasons applicable alike to all citizens of every

race and color, and regardless of color or race, the full accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed one hundred dollars, or shall be imprisoned not more than thirty days, or both."

Section 3 provides that there shall be no discrimination on account of race or color in the selection of grand and petit jurors.

This statute exemplifies the changed feeling of our people towards the African race, and places the colored man upon a perfect equality with all others before the law in this state. Under it, no line can be drawn in the streets, public parks, or public buildings, upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure; nor can such a line of separation be drawn in any of the public places or conveyances mentioned in this act.

But it is claimed by the defendant's counsel that this statute gives no right of action for civil damages; that it is a penal statute; and that the right of the plaintiff under it is confined to a criminal prosecution. The general rule, however, is, that where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute was intended to prevent; nor is it necessary in such a case as this to declare upon or refer to the statute. The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that when this suit was planted, the colored man, under the common law of this state, was entitled to the same rights and privileges in public places as the white man, and he must be treated the same there; and that his right of action for any injury arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen. This statute is only declaratory of the common law as I understand it now to exist in this state.

Any discrimination founded upon the race or color of the

citizen is unjust and cruel, and can have no sanction in the law of this state. The cases which permit in other states the separation of the African and white races in public places can only be justified on the principle that God made a difference between them, which difference renders the African inferior to the white, and naturally engenders a prejudice against the African, which makes it necessary, for the peace and safety of the public, that the two races be separated in public places and conveyances. This doctrine, which runs through and taints justice in all these cases, is perhaps as clearly and ably stated in *West Chester etc. R. R. Co. v. Miles*, 55 Pa. St. 212, 93 Am. Dec. 744, as anywhere. In that case, Judge Agnew says: "If a negro take his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. . . . To assert separateness is not to declare inferiority in either. It is not to declare one a slave and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

This reasoning does not commend itself either to the heart or judgment. The negro is here, and brought here by the white man. He must be treated as a freeman or a slave; as a man or a brute. The humane and enlightened judgment of our people has decided — although it cost blood and treasure so to determine — that the negro is a man; a freeman; a citizen; and entitled to equal rights before the law with the white man. This decision was a just one. Because it was divinely ordered that the skin of one man should not be as white as that of another furnishes no more reason that he should have less rights and privileges under the law than if he had been

born white, but cross-eyed, or otherwise deformed. The law, as I understand it, will never permit a color or misfortune that God has fastened upon a man from his birth, to be punished by the law, unless the misfortune leads to some contagion or criminal act; nor while he is sane and honest can he have less privileges than his more fortunate brothers. The law is tender, rather than harsh, towards all infirmity; and if to be born black is a misfortune, then the law should lessen, rather than increase, the burden of the black man's life.

The prejudice against association in public places with the negro, which does exist, to some extent, in all communities,—less now than formerly,—is unworthy of our race; and it is not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable. Nor shall I ever be willing to deny to any man any rights and privileges that belong in law to any other man simply because the Creator colored him differently from others, or made him less handsome than his fellows,—for something that he could not help in the first instance, or ever afterwards remove by the best of life and human conduct. And I should have but little respect or love for Deity if I could for one moment admit that the color was designed by him to be forever a badge of inferiority, which would authorize the human law to drive the colored man from public places, or give him less rights therein than the white man enjoys. Such is not the true theory of either the divine or human law to be put in practice in a republican form of government, where the proud boast is, that “all men are equal before the law.” The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice, or prejudice, or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot, in a public place, carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears. All citizens who conform to the law have the same rights in such places, without regard to race, color, or condition of birth or wealth. The enforcement of the principles of the Michigan civil rights act of 1885 interferes with the social rights of no man, but it clearly emphasizes the legal rights of all men in public places.

This idea of the equality of the races before the law was also

shown in the legislation of 1867, relative to public schools, which declared that "all residents of any district shall have an equal right to attend any school therein": Act No. 24, Laws of 1867.

This legislation was construed by this court as an act to prevent the exclusion of colored children from any public schools in the state, although separate schools for the education of blacks and whites might exist, where the accommodations and advantages of learning were fully equal one with the other: *People v. Beard etc.*, 18 Mich. 400. Our holding in the present case is also supported by the following authorities: *Coger v. Northwestern U. Packet Co.*, 37 Iowa, 146; *Clark v. Board of Directors*, 24 Iowa, 267; *People v. Board etc.*, 101 Ill. 308; 40 Am. Rep. 196; *Chase v. Stephenson*, 71 Ill. 383; *Messenger v. State*, 25 Neb. 674; *Baylies v. Curry*, 128 Ill. 287; *Board etc. v. Tinnon*, 26 Kan. 1; *Central R. R. Co. v. Green*, 36 Pa. St. 421; *Donnell v. State*, 48 Miss. 680; 12 Am. Rep. 875; *Decuir v. Benson*, 27 La. Ann. 1. See also the able dissenting opinion of Danforth, J., in *People v. Gallagher*, 93 N. Y. 458-466, inclusive.

Under the circumstances, as admitted by the defendant upon this record, the only question to have been properly submitted to the jury was the amount of the plaintiff's damages.

The judgment is reversed, and a new trial granted, with costs of both courts.

CIVIL RIGHTS — DISCRIMINATION AGAINST CERTAIN PERSONS. — As to the validity and constitutionality of statutes providing separate accommodations for white and colored persons, see *Louisville etc. R'y Co. v. State*, 66 Miss. 662; 14 Am. St. Rep. 599, and particularly note 605, 606. In *Baylies v. Curry*, 128 Ill. 287, it is decided that a proprietor of a theater who denies a colored person access to his theater, or to the several circles or grades of seats therein, on account of his race or color, is responsible to such colored person in damages for the injury. The same principles of law govern the rights of the white and colored races: *Smith v. Du Bose*, 78 Ga. 413; 6 Am. St. Rep. 260; *Spencer v. State*, 77 Ga. 155; 4 Am. St. Rep. 74.

ABRAHAM v. STEWART.

[88 MICHIGAN, 7.]

SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND — DEED WITH BUILDING RESTRICTIONS. — A contract for the conveyance of city land, providing that the deed therefor shall be subject to certain house line and building restrictions, to the effect that the house to be erected shall be at least two stories high, and not less than twenty feet from the front line of the lot, will be specifically enforced as made; and the vendee is not entitled to a deed free from such restrictions upon performance of the other conditions in the contract.

VENDOR AND VENDEE — SPECIFIC PERFORMANCE — COSTS. — A vendor, in an action to enforce specific performance of a contract to convey, will not be allowed costs when, for frivolous reasons, he refuses to execute a conveyance, though there is reason to refuse to execute the conveyance as demanded by the vendee.

James H. Pound, for the appellant.

Palmer and Palmer, for the respondent.

GRANT, J. The bill was filed in this cause to compel the specific performance of a contract to convey land. The contract contains the following clauses:—

“And that as part and further consideration of the sale as hereby made, the party of the second part shall, within — years from date, erect on said lot a suitable dwelling-house at least two stories high, the same to be of not less than eighteen-foot posts and to cost not less than — dollars; said dwelling to be not less than twenty feet from the front line of said lot; and on taking possession of said lot, shall put, keep, and maintain a sufficient fence around said lot. . . . And on the performance of all the conditions to be done and performed at the time and manner above mentioned and specified, on the part and behalf of the said party of the second part [complainant], the party of the first part [defendant] agrees to execute, or cause to be executed, to the party of the second part a good and sufficient warranty deed for the said land, subject, however, to the house-line and building restrictions herein mentioned, to be delivered on the surrender of this duplicate contract.”

The price has been paid, a house moved onto the lot and placed upon the house line, as provided by the contract. Complainant now claims that he has complied with the contract, and that he is entitled to a deed free from any house-line or building restrictions. Decree was entered in accordance with this view, and defendant appeals.

The agreement to erect a house has been complied with by moving onto the premises a house of the dimensions and character specified. It was not necessary to build a new house. The complainant has also complied with the contract in placing the house upon the line agreed upon. If a deed had been given with these restrictions, before the erection of the house, no question would arise until the owner of the lot should propose to build otherwise. The building having been erected, is the defendant entitled to have the restrictions expressed in the deed, and thus create a perpetual servitude upon the land? Such restrictions are common, and are sustained by the courts: *Linsee v. Mizer*, 101 Mass. 512; *Peck v. Conway*, 119 Mass. 546; *Sanborn v. Rice*, 129 Mass. 395. In *Peck v. Conway*, 119 Mass. 546, the covenant was, that no building should be erected upon the land conveyed, and was held valid. A deed with such restrictions in it as are contained in the contract in the case at bar would not give to the grantee the right to build a house in accordance therewith, and immediately thereafter remove it to the front line of the lot, or to tear it down or remove it from the lot, and erect another building upon the front line. Complainant by his deed can obtain no different or greater rights than those provided for in the contract. If the intention of the parties is clearly expressed in the contract, courts will enforce it, unless the restrictions or conditions are within Howell's Statutes, sec. 5562, which provides: "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded," etc.

It would be unreasonable to suppose these parties contracted that immediately upon the erection of the building the complainant might move it beyond the line, or that he might erect a dwelling-house of the dimensions called for, and immediately remove it and erect one that would not fulfill the terms of the agreement. These conditions may be of actual and substantial benefit to the defendant. It is clear that the deed was to be made subject to them. They are such as she had a right to make as a condition to the grant. It is admitted that the defendant owned other lands upon the street. The intention of such benefits is therefore apparent. It is entirely possible that the time may come when the maintenance of these conditions will be of no benefit to defendant or her grantees. In such case complainant and his grantees would no longer be

compelled to maintain them. That is a question for future consideration. Courts will not compel the observance of restrictions and conditions when they have ceased to be of any benefit. We think the defendant entitled to have these rights, under the contract, preserved in her deed. There is no difficulty in finding apt words in which to express them. The agreement to fence, contained in the contract, has been substantially complied with. But the deed was not to be made subject to any agreement to maintain fences in future.

The decree must be modified in accordance with the views above expressed.

Inasmuch as the defendant refused to execute a deed for other reasons than the above, which we regard as unfounded and frivolous, she will not be allowed costs.

THE CASE OF *Wertheimer v. Hosmer*, 83 Mich. 56, was an application for *mandamus* to compel George S. Hosmer, circuit judge, to dissolve an injunction issued on an *ex parte* showing, restraining the petitioners from using and enjoying certain real property in the city of Detroit. W. B. Clark, F. H. Clark, and Fanny B. Lane are the owners of a store-building in Detroit, and they filed a bill for an injunction, stating, substantially, that on September 15, 1887, a written lease was made of the store by the complainants to one C. H. Mitchell, to expire April 30, 1891. Mitchell occupied the store for the purposes named in the lease until about April, 1890, when he moved into the store adjoining, and requested the complainants to allow one T. S. Sprague to occupy the store. This request was granted by the agent of the owners, Mitchell agreeing to be responsible for the rent. The lease contained a clause against transfer, assignment, or subletting of any part of the premises without the consent of the lessors. Sprague continued in possession of the store until September, 1890, when he moved his stock out of and vacated the store. About October 13, 1890, complainants found that William and Max Wertheimer had the key to the store, and pretended to have a right thereto, and asked to be allowed to occupy the store as a clothing-house. This the complainants refused. The Wertheimers were then making repairs and changes in the interior of the store, when complainants demanded possession, and requested them to stop making the repairs. This they did not do, and about October 20, 1890, built platforms upon the floor, caused shelving to be put in the store, and lettered the door, advertising their business. Complainants never assented to the possession of the Wertheimers, who claim that they rented the store from Sprague for the term of Mitchell's unexpired lease, and propose to open it as a clothing-house. The Wertheimers are alleged to be totally irresponsible, and the bill prays that they be perpetually enjoined from interfering with any part of the interior or exterior of the store, from placing any sign upon the same, and from using or occupying any part of it. The injunction was issued as prayed. The Wertheimers, without answering, moved to dissolve the injunction, on the grounds that, — 1. Complainants have an adequate remedy at law; 2. They do not, by their bill, make a case entitling them to relief; 3. The injunction was granted *ex parte*, without notice to defendants; 4. No bond was filed before the injunction issued; 5. The bill was not signed by either of complainants; 6. The court had no juris-

twenty-fourths of the timber growing thereon, and that they have a right to cut and remove the same; admits that complainant owns the other undivided one twenty-fourth, and alleges that complainant had notice of their purchase. Defendants also filed a cross-bill, in which they set up this conveyance, the record of it in the miscellaneous records of the county of Manistee, notice on the part of complainant, Benedict, of the purchase, and pray that they may be adjudged to be the owners of said twenty-three twenty-fourths of the timber; that they may cut and remove it at any time prior to May 4, 1897; and, if necessary, that a partition of the timber may be decreed. It is unnecessary here to set forth the answer to the cross-bill.

The case was heard upon pleadings and proofs taken in open court, and a decree rendered dismissing the original bill, and adjudging that complainant and defendants owned the timber as tenants in common; that the timber be sold at public auction under the direction of a commissioner of the court; that the commissioner execute deeds to the purchasers at the sale; that said purchasers have the right to enter upon the lands, and cut and remove the timber within such time as shall be reasonable and just; and that after paying all costs and expenses the proceeds be divided between the complainant and defendants, twenty-three twenty-fourths to the one, and one twenty-fourth to the other.

In order to ascertain what rights these parties have, it is unnecessary to trace the title beyond the date of the conveyance under which the defendants claim. This conveyance was dated May 4, 1887. It purported to grant and convey to the defendants, their executors, administrators, or assigns, "all the timber now standing and being upon the following described lands," with license for the term of ten years to enter upon the lands, and to cut and remove the timber, all the timber not so cut and removed during the term to belong to the parties of the first part. This instrument was executed by Harry Mee and Anna L. Seymour, and was duly acknowledged, and recorded in the miscellaneous records of Manistee County, on the day it bears date. It was not recorded upon the record of deeds. At that date the title to the land stood as follows: Twelve twenty-fourths in Frank B. Pease; eleven twenty-fourths in Harry Mee and Anna L. Seymour; one twenty-fourth in George A. Hart. Frank B. Pease had, on April 29, 1887, executed an instrument to Harry Mee, purporting to

bargain, sell, and deliver unto him "all the goods, chattels, and property, to wit, all his interest in and to the timber on the premises described as follows" (giving the same descriptions above referred to). It also gave him the license for ten years to enter upon the lands, and cut and remove the timber. This instrument was also recorded on May 4th, in the miscellaneous records of Manistee County.

By subsequent deeds of conveyance, duly executed and recorded, complainant, Benedict, obtained the entire title in fee to these lands. None of these deeds contained any reservation of the timber, nor any reference whatever to the timber purchase by the defendants. The lands are wild, unoccupied, and chiefly valuable for timber of various kinds.

It is insisted by the defendants that under the conveyances from Pease to Mee, and from Mee and Seymour to them, they are the owners of twenty-three twenty-fourths of the timber, while the complainant contends that they are at most the owners of eleven twenty-fourths. In view of the final disposition of the case, it becomes unnecessary to determine this question. At the time of these conveyances, Hart was a tenant in common of the land, and complainant, Benedict, succeeded to his rights by deed. The rights of tenants in common are therefore involved, and by the law of tenancy in common they must be determined. It is therefore important to consider the statutes of this state upon this subject.

The statute makes provision for the partition of lands held in common. One tenant in common may present his petition to the circuit court in chancery, praying for a partition. Commissioners are appointed, whose duty it is to divide and allot the several shares and portions to the respective parties. If the lands can be divided, this must be done. No authority to sell, when partition can be had, is given. The law, common and statutory, has always most carefully protected the owners of land in their right to preserve and enjoy it as they desire. This is an inherent right, of which they can only be deprived on the ground of public necessity, by sale upon execution, and in certain cases of partition. This partition statute further provides that if the commissioners report that the lands held in common cannot be divided without great prejudice to the owners, and if the court shall be satisfied that such report is just and correct, it may then order a sale; but if any portion of the lands can be divided without great prejudice to the owners, it must be partitioned, and only those portions sold

diction to oust defendants by injunction from the possession and enjoyment, or to interfere with the enjoyment of said premises, except after final hearing; 7. Defendants were in possession under a valid lease; 8. The material averments in the bill have been denied under oath. The motion was heard upon affidavits and counter-affidavits, and refused. The injunction commanded defendants to refrain from occupying or using the premises in any manner, and required Mitchell and Sprague to desist from using the premises for any purpose other than that named in the lease, and from permitting any other person to occupy the premises or any part thereof. Defendants' affidavits show that in leasing the store they dealt only with Sprague, without knowledge that Mitchell was interested in the premises; that Sprague was in possession, representing that he had authority to lease the premises; that after repairing the store, and on October 13, 1890, they requested permission of Sprague to paint the store, and were referred by him to the solicitor of complainants, who informed them that they would not be allowed to occupy the premises, and requested them to refrain from making repairs. The clauses of the lease referred to are, that "the premises should be occupied for the sale of teas, coffees, spices, and similar goods," and that Mitchell should not sublet or permit the occupancy by any other party without the written consent of the lessors. As we have shown, it was admitted by the bill that the lessors assented to the leasing by Mitchell to Sprague.

In passing upon and deciding the issues thus raised, the court said: "A covenant not to assign or underlet the leased premises without the assent of the lessor is frequently inserted in a lease, and is regarded as a fair and reasonable covenant. But a license once given removes the restriction forever, as the condition is treated as entire, and therefore not capable of being waived or released as to part; but in order to have that effect it must be such a license as is contemplated in the lease; that is, if the lease provides that the license shall be in writing, an oral license is not good. It is not to be understood, however, that this written stipulation, not to sublet unless by consent of the lessor, in writing, may not be waived by an oral agreement; and such is not the contention of the counsel for the complainants here. The agreement to waive the condition as to Sprague, however, was not a waiver of the condition in the lease as to other parties, or for the carrying on of other business not contemplated by the lease, or the business to be carried on by Sprague. The consent that Sprague might enter and conduct the business of selling small musical instruments and sheet-music was a restrictive waiver of the condition, and applied only to Sprague and the business to be carried on by him. It gave Mitchell no right to lease to any other party, or to carry on a different business, and Sprague certainly could gain no greater rights than Mitchell had. The terms of the lease were not waived, but a license given to Sprague to enter and carry on that particular business, Mitchell to be holden for the rent. Sprague had no right to sublet, and Mitchell no right to sublet to any one but Sprague, and for that particular business. The words, contained in the lease, 'to be used for the sale of teas, coffees, spices, and similar goods,' amount to an express covenant not to be used for any other business. Covenants are not infrequently inserted in leases, that the lessees shall not carry on particular trades upon the premises. This precaution often becomes necessary, not only for the protection of the premises from injuries which might otherwise be done to them, but to prevent their respectability being lessened, and their good-will thereby diminished. Covenants of this kind, as they affect the mode of occupation and enjoyment, run with the land, and the assignee, though not named, will

be liable for damages, and may be restrained by injunction. It is quite apparent that any legal remedy which the complainants might have pursued would not have been adequate. It is not a question merely of damages, but the right of complainants to control the premises, or to put them to such uses as they might deem best. They restricted the use by the written lease; and it cannot be said that by consenting to Sprague's use and occupation complainants had waived or abandoned all rights over the property, so that it might be occupied by any person whom Sprague might see fit to put in, or with a business however obnoxious to the complainants or detrimental to the good-will of the premises."

The ruling of the court below refusing to dissolve the injunction was sustained, and the writ of *mandamus* denied, all the justices concurring.

COVENANTS restricting use of property, see note to *Ladd v. Boston*, ante, p. 481.

BENEDICT v. TORRENT.

[33 MICHIGAN, 151.]

CO-TENANCY — WASTE AND DAMAGES. — A tenant in common who cuts and removes timber from unoccupied lands is answerable to his co-tenant in an action on the case.

CO-TENANCY — VOID CONVEYANCE BY TENANT IN COMMON. — Where one tenant in common conveys to a stranger any but an undivided interest in the whole of the land, and such interest is prejudicial to the rights of the other co-tenants, such conveyance is void as to them. When partition is had between the co-tenants, such conveyance may be considered in partitioning the land so as to secure the interest of such purchaser.

CO-TENANCY — SALE OF INTEREST IN TIMBER — RIGHT OF PURCHASER. — One tenant in common cannot convey his interest in the timber on the common land, and thereby make his co-tenants tenants in common with his grantee. The interest thus gained by such purchaser is such interest as shall be set off to his grantor in partition proceedings. Such partition must be made of the entirety of the estate according to the shares held by each co-tenant. The purchaser will then be entitled to all timber interests secured by his conveyance.

Ramsdell and Benedict, for the appellant.

! *Niskern and Withey*, for the respondents.

GRANT, J. The bill in this case is filed by complainant, Benedict, to enjoin the defendants from cutting and removing the timber from the lands described therein, about eleven hundred acres. He avers that he is the owner in fee of the lands, sets forth his chain of title, alleges that defendants set up a claim to the timber upon the lands by virtue of a pretended conveyance thereof to them by some of complainant's grantors, and that they threaten to cut and remove the timber.

The answer admits complainant's title to the land, but claims that the defendants own the undivided twenty-three

which cannot be divided: Howell's Statutes, sec. 7882. It is not sufficient under this statute that the lands cannot be divided without prejudice. Great prejudice must exist, in order to warrant a sale. It is therefore entirely clear that the only decree which the court could render in partition proceedings would be a division of these lands as an entirety between the tenants in common, because no difficulty whatever exists in effecting a division.

A tenant in common cannot commit waste upon the common lands. If he does, he is subject to an action on the case, and must respond in damages: Howell's Statutes, sec. 7942. To cut and remove timber from unoccupied lands is waste.

Defendants did not by their purchase become tenants in common of the land. They did not purchase a moiety, but only a specific part of the moiety of their grantors, with license to enter and remove what they had purchased. Their grantors could not cut and remove the timber. Upon what legal principle can they obtain rights which their grantors did not possess? It is well settled that they could not become purchasers from Mee and Seymour of any interest in the land to the prejudice of the other co-tenants. This is so well settled, both by authority and reason, as to render citations unnecessary. The statutes above referred to plainly say that neither Hart nor his grantee could be compelled to part with his land or any interest therein by a sale. I think it also well settled that where one tenant in common conveys to a stranger any but an undivided interest in the whole of the land, where such interest is prejudicial to the rights of his other co-tenants, such conveyance is void as to them. When partition of the lands is had between the co-tenants, courts may properly consider such conveyance in partitioning the lands so as to secure the interest of such purchaser. This has been done in cases where one tenant in common has assumed to convey to a stranger a particular portion of the common property by metes and bounds.

The theory of the defendants is, that by the conveyance by Mee and Seymour to them a new tenancy in common was created, and Hart, Pease, Mee, and Seymour were tenants in common of the land, and Hart and the defendants were made tenants in common of the timber. If this were so, then Mee and Seymour might have sold and conveyed the gravel-beds, deposits of clay, stone-quarries, and deposits of ore, if any existed upon the lands, and thereby have created so many new

tenancies in common, and their grantees could have forced a sale of each interest as against the other co-tenants. Not only, therefore, may such a conveyance operate to the prejudice of those tenants in common who are not parties to it, but the inevitable result, as in this case, would be the substantial destruction of their landed estate.

The question here involved is new in this state, and we are able to find but one case in point in other courts, viz., *Boston Franklin Co. v. Condit*, 19 N. J. Eq. 394. In that case, one tenant in common had conveyed by deed an undivided one half of the iron, zinc, and other ores in certain lands. The question arose upon a bill for partition by a purchaser of this interest. As in this case, so in that, the grantor who had conveyed the one half of the iron and zinc had also conveyed the fee of the land, and the defendant was then the owner of the entire fee. The title as to said co-tenant was held void, and the bill dismissed.

Our conclusion is, that one tenant in common cannot, under the law of this state, convey his interest in the timber, and thereby make the other tenants in common co-tenants with his grantee. The only interest which such a purchaser takes is the interest in the timber upon such lands as in partition proceedings shall be set off to his grantor. Such partition must be made of the entirety of the estate according to the shares held by each. When this is done, the purchaser of the timber would be entitled to all the rights secured by his conveyance. The cross-bill in this case is filed for the sole purpose of effecting a partition of the timber. It is not framed to obtain a partition of the entire estate. Whether the defendants can now maintain such a bill is not now before us, and we express no opinion thereon.

The decree of the court below must be set aside, decree entered granting an injunction as prayed in the original bill, and the cross-bill dismissed, with the costs of both courts.

CO-TENANCY — WASTE BY ONE TENANT IN COMMON. — A tenant in common of the fee is liable to an account for waste, if he cuts timber and clears woodland upon the estate to an extent beyond that of his interest in the fee: *Johnson v. Johnson*, 2 Hill Ch. 277; 29 Am. Dec. 72. See also *Graham v. Pierce*, 19 Gratt. 28; 100 Am. Dec. 658; *Hancock v. Day*, 1 McMull. Ch. 69; 36 Am. Dec. 293; *Nelson v. Clay*, 7 J. J. Marsh. 133; 23 Am. Dec. 287.

CO-TENANCY — RIGHT OF ONE TENANT IN COMMON TO CONVEY THE COMMON PROPERTY: See *Barnes v. Lynch*, 151 Mass. 510; *ante*, p. 470, and note.

A very interesting and important case respecting the power of a tenant in common to grant an easement or other right to be exercised upon the com-

mon property is that of *Pfeiffer v. Regents of University*, 74 Cal. 156. In that case it appeared that one of the co-tenants, while in possession of a part of the common property, had granted to the trustees of the University of California the exclusive right in perpetuity to enter upon the land so occupied, and to collect and take away the waters of certain springs, which opened on and along a gulch and a ravine, and to hold and occupy so much of the land as might be proper and necessary for collecting the waters in basins and reservoirs, or for flooding by dams. Afterwards, a partition suit was prosecuted, and a partition made, but the persons claiming under the grant of the right to collect and divert waters were not parties to such action. In a subsequent action to quiet title and to enjoin the defendant from diverting any water, judgment was entered for the defendant, upon the ground that the parties holding the water rights were necessary parties to such partition, and therefore that it was void. In reversing the judgment of the trial court, the appellate court said: "In taking this view of the case, we think the court below erred. It is not necessary to discuss the question whether, if respondent had been the sole owner of the land at the time of its deed to Mrs. Brayton, the reservation would have left in respondent a mere personal privilege, or right in gross, or an interest in the land itself capable of partition. At the time of the execution of said deed, respondent was the owner of only an undivided interest in the land as tenant in common with the appellant and others; and as such tenant in common, it had no power to convey to a stranger, or to reserve to itself, after parting with the fee, the right to divert water entirely away from said land. A tenant in common cannot create an easement or servitude upon the common land. In *Goddard on the Law of Easements*, on pages 93 and 94, the result of the authorities on the subject is correctly stated as follows: 'So the grantor must be the sole owner of the fee. One joint owner or tenant in common cannot create an easement in the common estate as against his co-tenant, though probably he would be himself estopped to dispute a grant thus made. For the same reason, one tenant in common cannot, when conveying his own interest in the common property, create, by reservation, a personal and separate easement over the same for the benefit of his adjoining separate property.' In *Boston F. Co. v. Condit*, 19 N. J. Eq. 394, it was held that 'a grantee of the right to dig ores, from one tenant in common, cannot call for a partition of the premises.' See also 3 Kent's Com., 11th ed., 554; *Freeman on Cotenancy*, sec. 198; *Adam v. Briggs Iron Co.*, 7 Cush. 361; *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 667. We do not understand counsel for respondent as denying this to be the rule clearly established by the general authorities, and they cite no cases to the contrary. But they argue that, logically, the rule ought to be different in this state, on account of certain decisions made by this court (about another matter) in *Stark v. Barrett*, 15 Cal. 361; *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139; and some other cases which follow them. It was quite customary at one time for individual tenants in common of large Mexican grants to convey, or to undertake to convey, their interests in particular parts of the common land by metes and bounds, called 'special locations'; and the decisions last above referred to simply held, — 1. That the grants of such special locations were good as against naked trespassers; and 2. That they were not absolutely void as against the co-tenants of the grantor, but were taken subject to the co-tenant's right of partition of the whole tract, and might be lost to the grantee when such partition took place. These decisions are admitted to have been in conflict with many authorities of high standing, and were based, no doubt, to some extent, on equitable considerations, growing out of par-

ticular circumstances; and they should not be pushed further than the limits of their express terms. But there were no questions about easements in those cases. Whatever interest the grantor undertook to convey was all his interest or estate in the whole land described in the conveyance. There was no attempt to create or reserve a right to dig for minerals in the land, or to cut wood on it, or to take water from it, or to have a way over it, — no attempt to divide up the very body of the land and distribute it around. There is nothing, therefore, in those decisions that alters the well-established rule, as above stated, which determines the main point in the case at bar. Of course, the deed from Heywood to the College of California, and the deed from the latter to the respondent, or the state of California, are upon the same footing with the 'reservation' in the deed from respondent to Brayton. Neither the respondent nor the state of California had an estate or interest in the land, and neither was a necessary party to the suit for partition."

KNICKERBOCKER v. WILCOX.

[88 MICHIGAN, 300.]

AGENCY — LIABILITY OF AGENT ON UNAUTHORIZED CONTRACT. — A letter written by the cashier of a national bank on the letter-head of his bank, to a bank in another state, to the effect that if the latter bank will sign a replevin bond for customers of the writer's bank, "we will stand between you and all harm," and signed by the writer as "cashier," constitutes an agreement, when acted upon, into which a national bank cannot legally enter, and binds the writer personally, in the absence of clear and unequivocal proof that he was claiming to act for his bank, and did not intend to bind himself.

ENTER STATE JUDGMENTS, PRESUMPTION IN FAVOR OF — EVIDENCE TO IDENTIFY. — Where a judgment record in a suit upon a replevin bond, brought in another state, shows a copy of the bond set out at length in the complaint as the only cause of action relied upon, it will be presumed in support of the judgment that it was rendered after due proof of the execution of the bond declared on. For the purpose of identifying such judgment, parol evidence is admissible.

SECONDARY EVIDENCE, WHEN ADMISSIBLE TO SHOW CONTENTS OF WRITING. — If a replevin bond which forms the basis of a suit on a judgment is not within the jurisdiction of the courts of the state, secondary evidence of its contents is admissible.

JUDGMENTS, PROCUREMENT OF, BY FRAUD, IS QUESTION OF FACT. — A claim that a judgment rendered in another state was procured by fraud and collusion presents a question of fact to be determined by the jury, under proper instructions.

JUDGMENT AGAINST A SURETY IS PRIMA FACIE EVIDENCE AGAINST HIS PRINCIPAL of the amount which the latter is liable to pay, but is not conclusive.

Howell, Carr, and Barnard, for the appellant.

S. M. Constantine and Dallas Boudeman, for the respondent.

CARILL, J. This was an action of *assumpsit* brought to recover upon a written undertaking to indemnify the plaintiff against all harm by reason of his signing a replevin bond with Bellman and Handy in a suit brought by them against Naomi Warner, at Elkhart, Indiana. The following is the undertaking sued on:—

"JOHN COX, HENRY HALL, L. T. WILCOX, E. E. WILCOX,
President. Vice-President. Cashier. Asst. Cashier

"Established 1872. Reorganized 1884.

"THREE RIVERS NATIONAL BANK.

"THREE RIVERS, MICH., Oct. 11, 1886.

"W. H. KNICKERBOCKER, Cashier, Elkhart, Indiana.

"Dear Sir, — A replevin suit has been commenced in your county by Bellman and Handy, of this place, against Naomi Warner, of your place. They (B. & H.), being non-residents, are required to give bonds. They are good customers of ours, and if you will sign said bond, we will stand between you and all harm.
L. T. WILCOX, Cashier."

Defendant pleaded the general issue, and gave notice that it would be shown on the trial that the defendant did not, in any way, individually enter into the contract alleged in plaintiff's declaration; and also that if he ever did, either individually, personally, or as the agent or in behalf of another, enter into such contract, the conditions of the same had been fully satisfied and performed.

It is claimed by the plaintiff that on the strength of defendant's letter he signed the replevin bond as requested, as surety for Bellman and Handy, and that the same was delivered to the sheriff, who thereupon delivered the property taken under the writ to Bellman and Handy; that the replevin suit came on for trial in the Elkhart circuit court, and Bellman and Handy were defeated. The defendant elected to take a judgment for a return of the property. To satisfy such judgment, the same was returned to her. Nevertheless, she insisted that certain goods were not returned, and that other goods were returned in a damaged condition, and she brought suit upon the replevin bond in the Elkhart circuit court against Bellman and Handy as principals, and Knickerbocker as surety, to recover such damages. Bellman and Handy and Knickerbocker each employed Mr. Van Fleet as attorney to defend that action. There is no legal evidence in the record that Mr. Wilcox had notice of this suit, or oppor-

tunity to defend it. Upon the trial of this suit on the replevin bond, Mrs. Warner, the plaintiff, recovered a verdict for \$107.50, and costs. The court, on motion of defendants, granted a new trial, and when the same was about to come on for a second trial, Mr. Van Fleet, being of the opinion that it would be cheaper and better for his clients to compromise the suit than to try it, took the responsibility to effect a settlement, and for that purpose consented that Mrs. Warner might take a judgment against his clients for fifty dollars, and costs of the first trial. At this time, neither Bellman, Handy, nor Knickerbocker was present in court, or had any knowledge of such proposed settlement. But Bellman and Handy were at once notified of the same, and upon their objecting to such judgment, were informed by their attorney, Mr. Van Fleet, that Mrs. Warner was also dissatisfied, and that her attorney would consent to set aside the judgment and have a new trial, and that they could employ other counsel if they wished. This offer was not accepted, and the judgment of \$50, and costs, was allowed to stand, and the plaintiff, Knickerbocker, paid the same, on January 18, 1888, amounting in all to \$183.75.

Afterwards, Mr. Van Fleet presented a bill to Bellman and Handy for his services in the defense of the suit on the replevin bond. They refused to pay it, and he commenced suit in the Elkhart circuit court against Mr. Knickerbocker for the same bill. Thereupon Mr. Knickerbocker notified Mr. Wilcox personally of the fact that he had been sued, and that it was necessary for him to appear and defend. To this notice Mr. Wilcox paid no attention. In that suit a judgment was recovered by Mr. Van Fleet against Mr. Knickerbocker for \$150 damages and \$10.50 costs, which Mr. Knickerbocker afterwards paid. After the payment of these two judgments, Mr. Knickerbocker called upon Mr. Wilcox to make good his agreement and save him harmless by reason thereof. This Mr. Wilcox refused to do, and this action was brought.

Upon the trial, the plaintiff offered in evidence the letter written by Mr. Wilcox to him, October 11, 1886, upon the strength of which he claimed to have signed the replevin bond. This was objected to by defendant, upon the ground that it was not the undertaking of the defendant, but it appeared upon its face to be the undertaking of the Three Rivers National Bank, of which Mr. Wilcox was cashier. The objection was overruled, and the letter admitted.

Plaintiff also offered in evidence transcripts of the two judgments rendered against him in the Elkhart circuit court, and which he claimed he had been compelled to pay. These were objected to by the defendant upon the ground that it did not appear from any evidence in the case that the plaintiff had signed any replevin bond, as requested by defendant, and that it was incumbent upon the plaintiff to show the original of such bond, and that the plaintiff had in fact executed the same. The original of the replevin bond was not produced nor offered in evidence upon the trial. But what purported to be a copy of such bond, found in the transcript of the suit brought on the replevin bond, was offered, together with evidence by Mr. Knickerbocker and Mr. Van Fleet that the same was a true copy of the original bond. It was not shown that the original bond was lost, nor was the failure to produce it accounted for, otherwise than by evidence that it was delivered originally to the sheriff in Indiana, and sued on by Mrs. Warner in that state.

The defendant was allowed, on cross-examination of plaintiff's witnesses, to interrogate them in relation to facts having a tendency to impeach the judgments, upon the ground that they were collusive and fraudulent as to Wilcox. This was objected to by plaintiff's counsel, and error is assigned upon this ruling.

When the plaintiff had rested his case, the court, on motion of the defendant's counsel, instructed the jury to render a verdict for defendant. Error is assigned upon this ruling.

It does not appear upon what ground this instruction was given. It is defended by counsel for defendant upon the ground, first, that the alleged guaranty was not and did not purport to be the individual guaranty of the defendant, Wilcox; that he was acting for the Three Rivers National Bank, in his official capacity as cashier. Undoubtedly, if the paper in question had been a note or bill of exchange, or any other instrument which it was clearly within the power of the cashier to make for the bank, no question could be raised as to its being the contract of the bank. But in this case the paper relied on shows on its face that it was given in the course of a transaction which the bank could not lawfully enter into. National banks possess only such powers as are expressly conferred upon them by the act of Congress under which they are organized, and no power is given them to enter into contracts of suretyship in which they have no interest:

U. S. R. S., sec. 5136; *Bullard v. National Eagle Bank*, 18 Wall. 589; *Matthews v. Skinker*, 62 Mo. 329; 21 Am. Rep. 425; *Wiley v. First Nat. Bank*, 47 Vt. 546; 19 Am. Rep. 122; *First Nat. Bank v. Hoch*, 89 Pa. St. 324; 33 Am. Rep. 769. This rule of law must be presumed equally well known to both parties.

The paper not being the contract of the bank, then can it be said to be the contract of Wilcox himself? Does it, upon its face, appear so clearly to have been intended as the undertaking of the bank, executed through Wilcox as its cashier and agent, as to bring it within the rule that his want of authority to bind the bank, for which he assumed to act, does not render him individually liable, when the facts and circumstances indicate that no such liability was intended by either of the parties? In deciding this question, weight must be given to the argument that the writing of this letter will not lightly be assumed to have been a mere idle ceremony. We must assume that the parties to it intended it to have some effect. The cases in Missouri (*Michael v. Jones*, 84 Mo. 578; *Humphrey v. Jones*, 71 Mo. 62; and *Western Cement Co. v. Jones*, 8 Mo. App. 373), relied on by counsel for defendant, were all cases in which the guardian of an insane person had traded with his ward's estate, contrary to the provisions of law, and had suffered losses. The persons dealing with him had done so with full knowledge of the fact that he was acting, not for himself, but for his ward. It was held that where the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent.

We cannot apply that rule to this case, for the reason that it does not clearly and unequivocally appear that Wilcox was claiming to act for the bank, and that he was not intending to bind himself. To say that he intended to bind the bank is to suppose him ignorant of the plain rules of law governing the institution of which he was a principal officer. There are many cases in which it has been held that the addition to one's signature of his title does not make the paper the contract of the corporation in which he is an officer. Such designation has been treated as a mere description of the person: *Tilden v. Barnard*, 43 Mich. 376; 38 Am. Rep. 197; *Hayes v. Brubaker*, 65 Ind. 27.

The second argument advanced in support of the judgment is, that there was no proof in the case that the plaintiff signed

the replevin bond as he alleged in his declaration. I think this point is without force. The judgment record in the suit brought upon the replevin bond shows a copy of the bond set out at length in the complaint, as the only cause of action relied on. It will be presumed in support of such judgment that it was rendered after due proof of the execution of the bond declared on. For the purpose of identifying the judgment as rendered upon the bond signed by plaintiff at defendant's request, parol testimony was admissible. I think, also, a foundation was laid for the admission of secondary evidence of the execution of the bond. It was never in the possession of the plaintiff. It was delivered in the first instance to the sheriff at Elkhart, Indiana, and by him assigned to Mrs. Warner, who brought suit on it in that state. Presumably, therefore, it was out of the jurisdiction of the courts of this state, and secondary evidence of its contents was admissible: *Woods v. Burke*, 67 Mich. 674.

The third reason urged by defendant in support of the judgment is, that the judgments rendered in Indiana, for the payment of which plaintiff seeks to recover, were collusive and fraudulent as to him, and that he was not bound by them. If he is right in this position, still the questions involved in such a claim are not such as should have been passed upon by the court, as was done in this case. The question of fraud and collusion was for the jury, and should have been submitted to them, if properly in the case, under proper instructions.

As the case must go back for a new trial, I think it proper to say that the Indiana judgments, while *prima facie* evidence of the amount which the defendant is liable to pay to indemnify the plaintiff, are not conclusive upon him. He had no notice of the pendency of the first suit, and the judgment in that suit was finally entered by consent. It is open to him to impeach the good faith of this transaction if he can do so. If Mr. Knickerbocker employed counsel in good faith to defend that action, it was proper for him to do so, and any expense incurred by him in such defense was incurred for the benefit of Wilcox, as well as himself, and Wilcox would be liable to indemnify him against such payment. Of the suit brought by Mr. Van Fleet against Mr. Knickerbocker for counsel fees, Mr. Wilcox had due notice, and was asked to defend. Having declined to do so, we think he is bound by the judgment, unless it appear that it was rendered under such circumstances

of collusion between the parties as would amount to a fraud upon Wilcox.

The circuit judge was wrong in directing a verdict for the defendant, and the judgment must be reversed, and a new trial granted.

AGENCY — LIABILITY OF AN AGENT UPON AN UNAUTHORIZED CONTRACT. — The general rule is, that an agent is not liable upon a contract signed by him without authority, unless such contract contains apt words to charge him personally: *Wallace v. Bentley*, 77 Cal. 19; 11 Am. St. Rep. 231, and note. But the words "agent," "trustee," and such like words, do not show an intention to act in a representative character, being words merely *descriptio personæ*: *Peterson v. Homan*, 44 Minn. 166; 20 Am. St. Rep. 564, and note. The agent must show his principal liable upon the contract made by him, or he will be himself liable: *Stone v. Wood*, 7 Cow. 453; 17 Am. Dec. 629, and note; note to *Means v. Swormstedt*, 2 Am. Rep. 332, 333; *Tarver v. Garlington*, 27 S. C. 107; 13 Am. St. Rep. 628, and note.

EVIDENCE, SECONDARY, WHEN PROPER. — The contents of a paper which is beyond the jurisdiction of the court may be proved by secondary evidence without accounting for the non-production of the paper: *Manning v. Maroney*, 37 Ala. 563; 13 Am. St. Rep. 67.

FRAUD, QUESTION OF, IS FOR WHOM. — Fraud is ordinarily a question of fact for the jury: Note to *Brown v. Mitchell*, 11 Am. St. Rep. 757, 758.

JENNINGS v. MOORE.

[38 MICHIGAN, 221.]

MORTGAGES — PRIORITY AS BETWEEN MORTGAGE NOTES. — Where several distinct notes are secured by one mortgage, no one of them has any preference over the rest in consequence of falling due at an earlier date.

MORTGAGES — ASSIGNMENT OF PART INTEREST IN MORTGAGE CANNOT BE VARIED BY PAROL. — A sale and assignment of two of three mortgage notes and of a corresponding interest in the mortgage, containing no mention of priority of lien, cannot be varied by parol evidence to show an oral agreement that the assignee was to have a prior lien under the mortgage as security for the payment of his notes.

MORTGAGE ASSIGNEE'S FORECLOSURE OF PART INTEREST — PRIORITY OF LIEN — REDEMPTION. — An assignee under an assignment of a part interest in a mortgage and the notes secured thereby, containing no provision for any priority of lien, who has foreclosed, and upon the expiration of the time in which to redeem has purchased the equity of redemption, and has gone into possession under his sheriff's deed, does not thereby gain any priority of right over the assignor; but as the purchaser of the equity of redemption, he has a right to redeem from the lien of the assignor, and failing to do this, the premises will be sold and the proceeds divided according to the respective interests of the assignor and assignee.

G. M. Valentine, for the appellant.

George S. Clapp and A. Plummer, for the respondent.

LONG, J. The bill was filed in this cause to foreclose a mortgage upon real estate given by Mary L. Moore to the complainant.

The history of the transaction out of which this proceeding grows is, as set forth in the bill, that on May 9, 1874, complainant sold and conveyed ten acres of land to defendant Mary L. Moore for the sum of three thousand dollars, and she and her husband, Orrin E. Moore, gave complainant their notes for that amount. One note was for the sum of \$500, due in one year, and there were two other notes, for the sum of \$1,250 each, due in two and three years from date, respectively, all drawing interest at the rate of ten per cent per annum. To secure the payment of these notes, Mrs. Moore made and executed a mortgage for three thousand dollars upon this ten acres of land, and also upon forty acres of other land. This forty acres was also encumbered by a prior mortgage of four thousand dollars.

Soon after the execution of this mortgage and the notes, Abram Smith, the other defendant herein, sold to complainant his farm, and took towards the purchase price thereof the two notes first to fall due given by Mrs. Moore, that is, the \$500 and one of the \$1,250 notes, Jennings retaining the other note. At the time of this purchase, Jennings made an assignment in writing to Smith of that part of the Moore mortgage represented by the two notes so transferred to him. This assignment specifically sets forth the interest in the mortgage which Jennings transferred to Smith, as that part of said mortgage represented by said first two notes. None of the notes were ever paid.

In December, 1875, Smith began foreclosure proceedings by advertisement, and on March 22, 1876, the premises, consisting of said ten acres, were sold to Smith at sheriff's sale, for the amount of the five-hundred-dollar note, interest, and costs. When the year for redemption expired, Smith took possession under the sheriff's deed, and has ever since been in possession of the premises, claiming title through the sheriff's deed. Jennings has never made any claim to the premises, or attempted to assert any rights under his note and remaining interest in said mortgage, until the commencement of this suit.

Defendant Smith in his answer substantially admits the facts set up in the bill, but avers that at the time he took the notes from Jennings, and received the assignment of such part of the mortgage, it was expressly agreed and understood

that he was to have a lien under his two notes prior to any claims Jennings might have under the last note retained by him.

Testimony was taken in the cause, and Smith testified substantially to the facts set up in his answer. Complainant testified and claimed on the hearing that the purpose of the assignment was to sell to Smith only so much of the mortgage as secured the payment of the two notes sold to him, and that he (Jennings) still holds and owns an interest in the mortgage in the same proportion that his note bears to the whole debt; that is, that he holds and owns five twelfths, and Smith seven twelfths, of the mortgage, and that his rights were in no manner affected by the foreclosure made by Smith. Mrs. Moore did not appear, and the bill was taken as confessed as to her.

On the hearing, the court below decreed that the foreclosure proceedings had by Smith by advertisement be set aside, and the premises be sold, the moneys arising from the sale to be divided between Jennings and Smith in proportion to their respective interests; that is, to Jennings five twelfths, and to Smith seven twelfths. From this decree defendant Smith appeals.

The assignment does not state that Smith's two notes were to be held as prior liens over the note retained by Jennings. It does not purport to assign the whole interest which Jennings had in the mortgage, but only that part represented by the two notes given over to Smith. Whatever the understanding was as to which should have priority of lien cannot be shown except by the assignment itself. That was the agreement between the parties, and it cannot be changed or varied by parol evidence. Taking the assignment, then, as the agreement, it appears that Jennings was to and did retain five twelfths of the mortgage, and only transferred to Smith seven twelfths. This was an installment mortgage, and under the statute each installment must be taken and deemed a separate and independent mortgage: *Howell's Statutes*, subd. 4, sec. 8498. While this is so, where these several distinct payments are thus secured by one mortgage, no one of them has any preference over the rest in consequence of falling due sooner, but all have equal claims to be paid ratably out of the land: *Cooper v. Ulmann*, Walk. Ch. 251; *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 Mich. 447.

The foreclosure made by Smith in no manner, however, affected the rights of Jennings in the security. Neither had any preference over the other before such foreclosure, and no such preference was acquired by the proceedings to foreclose. It undoubtedly took away the rights of Mrs. Moore to the possession if the foreclosure proceedings were valid, but it in no manner adjusted the rights between Jennings and Smith. By the proceedings, Smith did not become the owner of the whole land, or any definite undivided interest therein, freed from the lien of Jennings's part of the mortgage. Though it operated as a foreclosure of the rights of Mrs. Moore, or any person claiming through or under her, yet Jennings's rights and interests were not changed under his mortgage lien, as his rights were in no way subordinate to those of Smith. But Smith having purchased Mrs. Moore's equity of redemption, he has the right to redeem from the lien under the Jennings portion of the mortgage. Failing in this within six months from this date, the premises will be advertised and sold as in ordinary foreclosure proceedings, and the moneys arising from the sale be brought into court and be distributed, under order of the court, between Smith and Jennings, in proportion as the notes held by each bear to the whole amount secured by the mortgage.

The decree of the court below setting aside the mortgage foreclosure made by Smith will be reversed, and decree entered in the court below in accordance with this opinion, the case to be remanded to the court below for the purpose of carrying out the decree. Complainant will recover his costs.

PAYMENT—SEVERAL NOTES.—Where four notes were secured by one mortgage, and the first two which matured were also signed by a surety, the property having been sold under the mortgage for an amount more than sufficient to pay off the first two notes, but not enough to discharge all the notes, the surety could not insist in applying such amount upon the first two notes, but the holders of the other notes were entitled to apply the money upon their notes: *Hanson v. Manley*, 72 Iowa, 48. Unsecured debts have the preference over secured debts: *Frazier v. Lanahan*, 71 Md. 131; 17 Am. St. Rep. 516. But in *Duncan v. Thomas*, 81 Cal. 56, it is decided that in the case of several obligations, neither party making the application, a payment by the debtor will be applied by the law upon the one which first matures; and this rule is applied in Georgia to unsecured and secured claims alike: *Lawton v. Blitch*, 83 Ga. 663.

ASSIGNMENTS—PAROL EVIDENCE.—Ordinarily, parol evidence cannot vary a written assignment: *Richardson v. Johnson*, 41 Wis. 100; 22 Am. Rep. 712; *Osgood v. Davis*, 18 Me. 146; 36 Am. Dec. 708.

MENZER v. MENZER.

[33 MICHIGAN, 312.]

DIVORCE — EXTREME CRUELTY. — Where a husband conveys to his wife his homestead and household furniture, constituting the bulk of his property, after which his wife refuses to cohabit with him, and although allowing him to keep a room in the house, finally drives him from it by moving away and leasing the house to strangers, this constitutes extreme cruelty on her part, which entitles the husband to a divorce.

Frank B. Leland, for the appellant.

Howard and Gold, for the respondent.

MORSE, J. The bill of complaint in this cause was filed November 24, 1888, praying for a divorce on the grounds of extreme cruelty and desertion. Defendant answered, denying the acts of cruelty and desertion charged, and alleging that the cause of their domestic unhappiness was the fault of complainant.

The parties were married in January, 1868, in California. Since 1870 the complainant has resided in Flint, Genesee County, Michigan. His wife lived with him until April, 1887, but now resides in Detroit. The children of the marriage live with her. There are four of them, — two sons and two daughters. At the time of the filing of the bill they were aged, respectively, twenty-two, twenty, fourteen, and ten years.

The testimony of the complainant makes a sufficient case of extreme cruelty on the part of his wife. Most of the acts charged, however, stand alone upon his evidence, without corroboration from any one. The children support the mother in her denial of cruelty to the father. To the same effect is the testimony of a domestic, a woman who lived in the family for ten or twelve years, and up to within two or three years of the separation of the parties. The circuit judge, before whom the testimony was taken in open court, refused the complainant a decree, and dismissed his bill.

One of the main charges of cruelty in the bill, we think, is sustained by the evidence. The complainant is shown to be a hard-working, industrious man, and more than generous in his expenditures for his family. His wife was inclined to be extravagant, but her wants and wishes were always gratified in the way of household expenses. The testimony of every disinterested witness shows that, ordinarily, the complainant was the most indulgent of husbands and fathers, and more so than his means warranted. One of his sons testifies: "My

father seemed to do everything he could for his family." There were quarrels between husband and wife, in which neither was blameless, but he has been more sinned against than sinning.

He erected a comfortable and substantial home upon two lots in the city of Flint, which is worth four or five thousand dollars. This he caused to be deeded to the defendant. He also gave her all the furniture therein, except his own personal belongings. This was the bulk of his property. For some time after his wife refused to cohabit with him, he was allowed the privilege of a room in this house, but finally he was driven from it. His wife moved to Detroit, and rented the homestead to strangers. It is evident, also, that he was not well treated for some time before he was compelled to leave the house. We think this action of the wife can be considered extreme cruelty.

One of his daughters also sent a communication to a disreputable paper at Saginaw, which was published, in relation to her father, showing a malicious spite and feeling not commendable in any child, much less in one who had been so generously and kindly treated as she had been by her father. The mother aided and abetted the daughter in this transaction. It is evident that the wife has lost all affection for her husband, and does not desire to live with him any longer. But she is determined that he shall not have a divorce, and is actuated in this determination by something more than the fact that she is a Catholic, and does not believe in divorces, which she claims is the reason of her opposition.

The decree of the court below, dismissing complainant's bill, is reversed. He will be granted a decree of absolute divorce here for extreme cruelty. No costs will be allowed either party. As the wife has nearly all the property, no alimony will be granted her.

DIVORCE—EXTREME CRUELTY.—As to what constitutes cruelty which is a valid ground for a divorce, see *McVickar v. McVickar*, 46 N. J. Eq. 490; 19 Am. St. Rep. 422, and note 433; *Youngs v. Youngs*, 130 Ill. 230; 17 Am. St. Rep. 313, and note.

SHAW v. HILL.

[88 MICHIGAN, 82.]

EJECTMENT—PARTIAL. — An employee of defendant in ejectment, who is permitted to reside upon the disputed premises when the suit is brought, and who claims no interest in the land, is not a necessary party defendant.

EJECTMENT, WHAT NECESSARY TO MAINTAIN. — Plaintiff, who has no title to the land, but entered into possession in good faith, under a claim of right which proved valueless, may maintain ejectment against one who obtained possession through plaintiff's tenant, and who shows no title, right, or interest in the land, except a claim, merely asserted, and not proved, of being the original owner.

EJECTMENT. — EQUITABLE TITLE CANNOT BE SET UP to overthrow a legal title in an action of ejectment.

EJECTMENT — EQUITABLE TITLE — DEFENSE. — The right of possession under color or claim of title by plaintiff in ejectment may be *prima facie* title as against a mere intruder; but when an equitable interest is shown by defendant which is unconnected with and independent of plaintiff's claim of title, such defendant may show in defense that plaintiff has no title to the premises.

Jacob J. Van Riper and George S. Clapp, for the appellant.

O. W. Coolidge and Edward Bacon, for the respondent.

MORSE, J. This case has been here once before, and will be found reported in 79 Michigan, 86. The facts are not materially different from what they were then, except in the showing made by defendant as to her title to the premises.

There was also on the last trial some evidence tending to show that one Curran was in the actual occupancy of the premises at the time this suit was brought, and it is claimed by the defendant that he should have been made a defendant. It was shown, however, that the occupancy of Curran was for but a short time, and while he was working for defendant; that he made no claim to any rights in the land, either as tenant or otherwise. It seems he wanted to move into the house on the premises, and the defendant permitted him to do so. Under the circumstances, it was not necessary to make him a party.

We held in the case when it was here before that plaintiff, although he was shown to have no title in the land, but entering into possession in good faith, under a claim of right — his tax title deeds — which proved valueless, could nevertheless maintain ejectment against the defendant, who obtained possession through plaintiff's tenant, Streeter, and who showed no title, right, or interest in the land, except a claim, merely

asserted, but not proved, of being the original owner of the land; citing *Bertram v. Cook*, 32 Mich. 521; *Cook v. Bertram*, 37 Mich. 125; *Bertram v. Cook*, 44 Mich. 397; *Morse v. Byam*, 55 Mich. 594; *Fuller v. Sweet*, 80 Mich. 241; 18 Am. Rep. 122. See *Shaw v. Hill*, 79 Mich. 90. But it was also pointed out in the opinion that had the defendant proved title to herself in the land, the suit could not have been maintained by the plaintiff, for the reasons given in *Jochen v. Tibbells*, 50 Mich. 36, where it was said that if "the landlord seeks to recover the possession he can do so under the lease; but if he goes further, and claims the premises in fee, the tenant is not estopped from denying any right claimed by the plaintiff further or greater than that of possession. This fully protects the landlord, who regains his possession, and the tenant, having gained no advantage by taking a lease, the parties then are in proper position to litigate the title, should they desire so to do. If the plaintiff's position is correct, a judgment in fee may be obtained by estoppel against the tenant, and thus the landlord has acquired an advantage which he would not be entitled to."

This is exactly what has been done in this case. The verdict was directed by the court that the plaintiff was well entitled to hold the premises in fee, and against the defendant for possession; and without any title at all, the plaintiff has judgment against the defendant for the fee of the land. It is true, when the case was here on the other record, we said that such a judgment might be entered as against a mere intruder upon the possession of one having prior possession, and being ousted by such intruder; and that against such an intruder the person first in possession, claiming title, has a valid, subsisting interest amounting to a *prima facie* title in fee. The trial court undoubtedly intended to follow our ruling when he directed the verdict as he did upon the last trial.

But upon the first trial Mrs. Hill made no proof of any right or title in herself to the premises, and this was the controlling fact which ruled our holding when the case was first here. Upon this record, it appears that she proved at least an equitable title to or interest in the land, entirely independent of and adverse to any claim of plaintiff. She showed a patent from the United States to Charles J. Lanman, September 10, 1833. She also introduced the records in the office of the register of deeds of Berrien County, which showed a deed by Lanman and wife to Stanley H. Fleetwood, September 13,

1850, and by Fleetwood to Charles Butler, May 1, 1852, by Butler to Clinton B. Fiske, July 6, 1853, and by Fiske to James B. Crippen, May 16, 1855. These deeds were all recorded on and before May 18, 1855. It was also shown that, February 9, 1866, Crippen sold this land to Greenleaf Glidden upon a land contract. This contract was recorded, but was not acknowledged, and was shown by the record. Crippen died in 1869, and left a will, in which he directed his executors to sell all his lands. His wife was appointed executrix in his will, in company with Clinton B. Fiske and David B. Dennis. Mrs. Crippen alone qualified, for what reason the probate records fail to show. Glidden assigned his contract to the defendant, and Mrs. Crippen ratified it, and, as executrix, deeded the land to Mrs. Hill, January 18, 1872.

The deed from Lanman to Fleetwood was executed in Connecticut before one John T. Waite, purporting to be a commissioner of deeds within that state for the state of Michigan. It was objected to because it did not purport to be executed and acknowledged according to the laws of the state of Michigan, because the record did not show that the acknowledgment bore the official seal of the commissioner. The record of the deed from Fleetwood to Butler was also objected to, because the acknowledgment did not recite "that it was executed according to the laws of the state of Michigan, or that the execution of the same was the free act and deed of the grantor." It was acknowledged before a commissioner of deeds in the state of New York. The deed from Mrs. Crippen, as executrix, was objected to for the reason that it was executed and acknowledged by her alone, and was never signed or acknowledged by Clinton B. Fiske or David B. Dennis, executors named in her husband's will. The record of the contract to Glidden was objected to because there was no law authorizing its record, it not being witnessed or acknowledged. These evidences of title in Mrs. Hill were all received by the court, in the first place, when offered in evidence, under the objections above noted. By his ruling afterwards, he evidently held the chain of title not complete, but in what respect is not shown by the record.

Conceding that the chain of title from the United States to Mrs. Hill was not established, was there enough shown to permit her to contest the title of the plaintiff, or his *prima facie* title arising out of his prior possession? There was certainly enough to show that she was more than a mere intruder with-

out any claim of title whatever. She has certainly shown an attempt to convey the title from Lanman through mesne conveyances, and the equity of none of them is controverted. There is nothing tending to show a want of good faith in any one of the conveyances. She has not the legal title, simply because of defects in the acknowledgments of some of the deeds.

But it is said that her title or interest being merely an equitable one, it cannot be shown as a matter of defense in an action of ejectment. It has been held by this court many times that an equitable title cannot be set up against the legal title: *Ryder v. Flanders*, 30 Mich. 336; *Whiting v. Butler*, 29 Mich. 122; *Conrad v. Long*, 33 Mich. 78; *Harrett v. Kinney*, 44 Mich. 457; *Yale v. Stevenson*, 58 Mich. 537; *Geiges v. Greiner*, 68 Mich. 153. But this is not setting up an equitable title against a legal title. The cases above cited are those where the legal title was fully established, and the evidence of the equitable title was sought to be introduced to overthrow the legal title, which, without such evidence, was admitted. But here the plaintiff is shown to have no title. The title or interest of the defendant is independent of the title claimed by plaintiff, and has no connection with it. If plaintiff's tax titles are void, as they seem to be conceded to be, his only right to the premises is the right of possession under color of title as against a mere intruder without any title, which in law, as against such intruder, will be deemed a *prima facie* title in fee. But with the defendant in possession when plaintiff commenced his action of ejectment, with an equitable title or interest in the land, and the plaintiff without title, although defendant might be estopped by her agreement with Streeter from disputing plaintiff's right to the possession, can he recover against her the title in fee to the premises? We think not. He would thereby gain an advantage over the defendant that he was not entitled to: *Jochen v. Tibbells*, 50 Mich. 36.

Plaintiff's action for his possession, if he was entitled to it, should have been by summary proceedings under the statute. If he chooses to bring ejectment, he must be prepared to show some interest in the land other than a naked right to the possession. He must have "a valid, subsisting interest" in the premises as well as the right to possession: *Howell's Statutes*, sec. 7790. The right of possession under color or claim of title may be *prima facie* title as against a mere intruder, but when an equitable interest is shown by the defendant in the

land, an equity unconnected with and independent of plaintiff's claim of title, such defendant may show, in defense to the action of ejectment which has been planted against him, that plaintiff has no title at all to the premises.

The judgment must be reversed, and a new trial granted, with costs of this court to defendant.

EJECTMENT—PARTIES TO THE ACTION.—As to who may be joined as parties defendant in an action of ejectment, see *Allen v. Ranson*, 44 Mo. 263; 100 Am. Dec. 282; *Den ex dem. v. Branson*, 5 Ired. 426; 44 Am. Rep. 45, and note.

EJECTMENT—PLAINTIFF'S TITLE.—As to the title in the plaintiff necessary to maintain an action of ejectment, see *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301, and note 306, 307.

EJECTMENT—DEFENSE TO THE ACTION.—In an action of ejectment, the general rule seems to be that all defenses not legal in their nature are excluded; neither equitable title nor equitable defenses are available to the defendant: *McKay v. Williams*, 67 Mich. 547; 11 Am. St. Rep. 597, and note. But in California, New York, and Texas, equitable defenses and equitable titles may be relied upon by the defendant: *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593; *Orary v. Goodman*, 12 N. Y. 286; 64 Am. Dec. 506; *Neill v. Kesse*, 5 Tex. 23; 51 Am. Dec. 746.

RICHARDS v. CONTINENTAL INSURANCE COMPANY.

[83 MICHIGAN, 506.]

INSURANCE—OCCUPANCY OF DWELLING.—An insured dwelling which has been abandoned as a dwelling two days before its loss by fire, and with no intention to return, is, in law, vacant, within the meaning of an insurance policy providing that it shall be void if at any time the house shall become vacant or unoccupied.

INSURANCE—OFFER OF COMPROMISE—WAIVER.—An offer to compromise a loss for half the amount due on a policy of insurance, made by a general adjuster without authority to waive or alter any of the terms of policies, and without any admission of liability on the part of the company, does not constitute a waiver of the right to forfeit the policy under a clause providing for forfeiture in case the premises shall become vacant and unoccupied.

Thomas A. Wilson and Daniel A. Ferguson, for the appellant.

Barkworth and Cobb, for the respondent.

GRANT, J. This is a suit upon a policy of insurance to recover for a loss by fire of a dwelling-house covered by the policy.

The principal question in the case is, whether the building was "vacant or unoccupied" so as to avoid the policy. The

house had been occupied by a tenant of the plaintiff. The plaintiff had notified his tenant to vacate the house, which the tenant agreed to do, and did. The tenant rented another house, and moved into it with his family two days before the fire occurred. Plaintiff lived about a mile from the house, and was informed that his tenant had left. The tenant left some goods in the house, but they were not such as he needed at the time for the purpose of housekeeping. He spoke to the plaintiff about leaving them there temporarily. The policy provided that it should be null and void if at any time the house should be or become vacant or unoccupied.

I think the house was "vacant" within the rule of *Bonenfant v. American Fire Ins. Co.*, 76 Mich. 653. It was there said: "Occupancy implies an actual use of the house as a dwelling-place." This dwelling-house had been abandoned so far as any occupancy was concerned. The tenant had left, with no intention to return, and no other person was moving in to take his place. The contract of insurance was violated, and thereby rendered null and void. The occupancy provided for in the contract of insurance had ceased. This was not a question of fact for the jury. The facts were undisputed. The question was therefore one of law for the determination of the court.

It is insisted by the plaintiff that the defendant waived its right to make this a defense. The policy provided that no other than the superintendent of the western department of the defendant at Chicago should have power or authority to waive or alter any of the terms or conditions of the policy, and that all the agreements by the superintendent must be signed by him. No waiver, written or verbal, by this superintendent is claimed. Upon being informed of the loss, the adjuster and general agent for Michigan, by appointment, met the plaintiff, who told him about the removal of the tenant from his house. Plaintiff testifies that the adjuster replied: "We consider it vacant, but we are not going to be technical about the matter. We are satisfied that you had the loss. I will pay you \$450 and cancel your policy, if you will take it."

The policy was for nine hundred dollars, and the property was worth considerably more than that. Plaintiff declined to accept the proposition, when the adjuster again said: "Well, think of it two or three weeks, and any time you conclude to accept this offer write to me, and I will cancel your policy, and pay you \$450."

This did not constitute a waiver. A man may, without prejudice to his rights, offer to buy his peace. This offer of compromise was inadmissible in any aspect of the case. The solemn and deliberate contracts of parties cannot be set aside by such offers. The language used by the adjuster contained no admission of liability on the part of the defendant. Plaintiff's rights under the contract were not prejudiced or injured by this conversation. He lost nothing by it, and was not thereby induced to forego any of his rights under the policy. The circuit judge therefore properly instructed the jury to render a verdict for the defendant.

Judgment affirmed, with costs.

FIRE INSURANCE—“VACANT AND UNOCCUPIED.”—As to the significance and meaning of the words “vacant and unoccupied” as used in policies of fire insurance, see *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 259; 20 Am. St. Rep. 69, and note; *McQueeny v. Phoenix Ins. Co.*, 52 Ark. 257; 20 Am. St. Rep. 179, and note.

FIRE INSURANCE—WAIVER OF CONDITION.—As to what is necessary to constitute a waiver on the part of an insurance company, such as will prevent it from relying upon the terms of the policy, see *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809.

WOLF v. SLOSSON.

[88 MICHIGAN, 543.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—PREFERENCES.—An assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor by proof of unlawful preferences or of any fraud in the matter of such assignment.

Charles B. Lothrop, for the appellant.

Charles H. Rose, for the respondent.

CAHILL, J. Stevens and Farrar, a firm doing a general hardware business at Evart, Michigan, made a general assignment for the benefit of their creditors on February 8, 1890, to the plaintiff, who, with his brother, were bankers at Evart, under the name of Wolf Brothers. No question is made of the regularity, and strict compliance with the provisions of the statute, of all the assignment proceedings on their face, including the filing of the bond, notice to the creditors, etc.

On February 1, 1890, Stevens and Farrar, claiming to be indebted to Wolf Brothers in the sum of five hundred dollars,

gave them a chattel mortgage on their stock, due April 1, 1890, for that amount.

Fletcher, Jenks, & Co. are a firm doing a wholesale hardware business at Detroit, and at the time of the assignment of Stevens and Farrar, were their creditors to a large amount. On February 28, 1890, Fletcher, Jenks, & Co. began a suit in the circuit court of Osceola County, by attachment, against Stevens and Farrar, and the appellant, the sheriff of said county, took, by said writ, the goods in controversy from the assignee. This suit in trover was then brought by the assignee against the sheriff.

On the trial, the plaintiff offered in evidence, and relied upon, the assignment and the proceedings subsequent thereto to support his title. Evidence was also offered of the seizure of these goods, while in the hands of the assignee, by the defendant under his writ of attachment against Stevens and Farrar. The defendant offered in evidence the chattel mortgage, dated February 1, 1890, from Stevens and Farrar to Wolf Brothers, claiming that it was really a part of the assignment, was simultaneous with it, and was taken with full knowledge on the part of the assignee of the insolvency of the assignors, and of their intent to make an assignment, and constituted such a preference as to render the assignment void as against the attachment levy. The trial judge excluded the mortgage, holding that, even were the facts as claimed, this preference did not avoid the assignment, and constituted no defense to the action, and that a creditor's only remedy in case of such preference was by proceedings in equity under the statute.

The question here raised is as to whether an assignment, under chapter 303, section 1, Howell's Statutes, which provides "that all assignments commonly called common-law assignments for the benefit of creditors shall be void, unless the same shall be without preferences as between such creditors," can be attacked in a court of law by proof of unlawful preferences. It is conceded by counsel for appellant that the rule was considered as settled in this state against him by *Coots v. Radford*, 47 Mich. 37, except for the case of *Kendall v. Bishop*, 76 Mich. 634. But it is claimed that the latter case has shaken the view formerly entertained by the profession, and that many now regard the doctrine of *Coots v. Radford*, 47 Mich. 37, as essentially modified, if not entirely overruled. We are all agreed that it was not the intention of the court, in

the case of *Kendall v. Bishop*, 76 Mich. 634, to overrule *Coots v. Radford*, 47 Mich. 37. The instrument considered in *Kendall v. Bishop*, 76 Mich. 634, was not intended by the parties to it as an assignment under the statute. It was held to be an assignment by construction merely. No attempt had been made by the parties to comply with the statutory requirements concerning assignments by giving a bond, or in any other respect, and although the decision was not put upon the ground that an attachment would lie against the property because the statutory requirements concerning assignments had not been complied with, still, that fact was in the case, and must have had its weight in determining the result.

It was said in *Beard v. Clippert*, 63 Mich. 719, that "a creditor of the assignors, after the time given by the statute to file the bond has expired, has two remedies open to him. He may proceed upon the equity side of the court to have the trust carried out through the intervention of a receiver and the supervisory powers of a court of chancery, or he may, if no other creditor invokes the aid of chancery, proceed to enforce his claim against the property of his debtor by levy of attachment or execution, as if the attempted assignment had not been made. He is not obliged, because an attempted assignment has been made, but fails utterly for want of the filing of the required bond, to proceed to enforce the trusts of the assignment in a court of equity."

It is said that the language here used was *obiter*, but nevertheless it states the doctrine which was applied in the case of *Kendall v. Bishop*, 76 Mich. 634.

It must be declared as the settled law of this state that an assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor, by proof of unlawful preferences, or of "any fraud in the matter of such assignment." Relief against such a fraud is ample, under sections 6 and 11 of the act, but when given, it will be for the benefit of all concerned as creditors. To declare an assignment void on the ground that it gives a preference to A, so that B may obtain a like preference by attachment, is not what the statute contemplated, if all its provisions be read together. This is not saying that such a construction of the statute is without difficulty. The apparent inconsistencies of the various provisions have been considered in former cases, and the effort has been in each case so to harmonize them as to secure, if possible, the beneficial

results intended to be accomplished, viz., an equal distribution of an insolvent estate among creditors: *Fuller v. Hasbrouck*, 46 Mich. 78; *Munson v. Ellis*, 58 Mich. 331.

The judgment must be affirmed, with costs.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. — As to when an assignment for the benefit of creditors is not vitiated by fraud, see note to *Hempstead v. Johnston*, 35 Am. Dec. 473, 474.

FIX v. SISSUNG.

[83 MICHIGAN, 561.]

JURISDICTION NOT CONTROLLED BY ALLEGATIONS IN COMPLAINT. — A declaration made in bad faith, alleging an excessive value for the purpose of maintaining a suit in the circuit court which should properly be brought in a justice's court because of the amount involved, is a fraud on the court, and will be dismissed on motion for want of jurisdiction.

Gouverneur Morris and I. G. Humphrey, for the appellant.

George M. Landon, for the respondent.

CHAMPLIN, C. J. The defendant found a flock of twenty geese belonging to the plaintiff, who was a neighbor, trespassing upon his field, and shut them up, and sent word to plaintiff that he must pay damages. Plaintiff tendered one dollar for damages, and demanded the geese. Defendant refused to accept one dollar, but wanted five dollars for damages, and twenty-five cents for feeding the geese. Thereupon the plaintiff sued out a writ of replevin in the circuit court for the county of Monroe, stating in his affidavit that the geese had been distrained or impounded, and were unlawfully detained. The sheriff executed the writ, and returned that he had replevied from the defendant four old geese and fifteen young ones, and one young goose was not found. The total lot replevied were appraised at \$8.80.

Before pleading, the defendant moved to dismiss the writ and set aside the proceedings, for the reason, among others, that the court had no jurisdiction. Two grounds were asserted as the basis of this motion: 1. That "geese" were not within the statute authorizing the distraining and impounding of "beasts"; 2. The appraised value of the property showed that the court had no jurisdiction.

The motion was resisted, and the court denied it, for the reason that it was at that time premature. Upon the second

point, he held that the plaintiff was not precluded by the appraisal, but might allege in the declaration, and prove upon the trial, that the value of the property exceeded one hundred dollars. The plaintiff's counsel would not admit the value of the property to be less than one hundred dollars, but exhibited a declaration which he proposed to, and afterwards did, file, alleging the value at two hundred dollars. Upon the first point, the court said he thought it clear that geese did not come within the general statutes regulating distress, impounding, and replevin of "beasts"; but as sections 673 and 2869, Howell's Statutes, provide that villages and townships may make regulations respecting the restraining and impounding of animals, including geese, he would be obliged to await the development of the proofs upon the trial; but if the plaintiff should fail to bring himself within the statute, he should feel it his duty to dismiss the case for want of jurisdiction, and permit the plaintiff to proceed at his peril. Upon the trial, no such proof was attempted, and plaintiff offered no proof as to the value of his geese, and strenuously opposed the introduction of evidence, by the defendant, of their value. Such evidence was admitted by the court, and showed the value of the property replevied to be nine dollars.

It is now claimed that the circuit court had jurisdiction, because the plaintiff alleges the value to be two hundred dollars. The claim is unjustifiable. The facts show that the value alleged in the declaration was made in bad faith, and was a fraud upon the court. Section 18 of article 6 of the constitution confers upon justices of the peace exclusive jurisdiction in civil cases to the amount of one hundred dollars. While values of property depend, in a large measure, upon opinion, and this court, when the value is near the limit, will not declare in all cases a want of jurisdiction, if in good faith the declaration alleges the value within the jurisdiction of the circuit court, nevertheless it will not hold that jurisdiction is obtained when the fraud upon the court is apparent, as it is in this case. The circuit court had no jurisdiction of the subject-matter nor the process.

The court was right in dismissing the case, with costs, and the judgment is affirmed, with costs.

JURISDICTION AS TO VALUES, HOW DETERMINED. — The constitutions or statutes of the different states usually provide that the jurisdiction of certain courts shall extend only to cases where the amount in litigation shall exceed or shall not exceed a certain sum. Generally speaking, it is the

amount of the plaintiff's claim, as shown by his complaint or by the summons, which determines the court's jurisdiction. It is almost universally maintained that the amount claimed by the plaintiff in the *ad damnum* clause of his declaration, petition, or complaint, or that named in the summons, determines the question of the jurisdiction of a court to entertain an original proceeding, and not the value of the property involved in the controversy, as established by the evidence at the trial, nor the amount found by the jury or finally recovered. This rule is equally applicable to actions commenced in inferior or superior courts, at law or in equity, in actions *ex contractu* or *ex delicto*. From the host of authorities in which this doctrine has been sustained, the following may be cited: *Skinner v. Bailey*, 7 Conn. 496; *Peter v. Schlusser*, 81 Pa. St. 439; *Scott v. Moore*, 41 Vt. 205; 98 Am. Dec. 581; *Vineyard v. Lynch*, 86 Mo. 684; *Giles v. Spinks*, 64 Ga. 205; *Ashuckat Bank v. Pearson*, 14 Gray, 521; *Inhabitants of Township No. 11 v. Weir*, 9 Ind. 224; *Pate v. Shafer*, 19 Ind. 173; *Gaurd v. Circle*, 16 Ind. 401; *Culley v. Lay'nook*, 8 Ind. 285; *Lafferty v. Day*, 7 Ark. 258; *Cole v. Hays*, 78 Me. 539; *McVey v. Johnson*, 75 Iowa, 165; *Cavender v. Ward*, 28 S. C. 470; *Derby v. Stevens*, 64 Cal. 287; *Pennybecker v. McDougal*, 48 Cal. 160; *Solomon v. Reese*, 34 Cal. 28; *Cilley v. Van Patten*, 68 Mich. 80; *Miles v. Couchman*, 4 J. J. Marsh. 242; *Singleton v. Madison*, 1 Bibb, 342; *Abney, Love, & Co. v. Whitted*, 28 La. Ann. 818; *Tyler Cotton Press Co. v. Cherafier*, 56 Ga. 494; *Block v. Fontenot*, 35 La. Ann. 965; *Zubertier v. Morse*, 36 La. Ann. 970; *Little v. State*, 75 Tex. 616; *McQuade v. O'Neil*, 15 Gray, 53; *Clay v. Barlow*, 123 Mass. 378; *Merrill v. Butler*, 18 Mich. 294; *Stephen v. Eiseman*, 54 Miss. 535; *Fenn v. Harrington*, 54 Miss. 733.

As illustrations of these principles, it may be said that jurisdiction in replevin attaches according to the claim made in the affidavit: *Chilson v. Jenkinson*, 60 Mich. 235. Where the plaintiff in his declaration claimed one hundred dollars, the mere fact that the copy note attached to the declaration and the note itself was for more than that amount is no ground for arresting the judgment: *Wilhelms v. Noble Brothers & Co.*, 36 Ga. 599. And a court whose jurisdiction is limited to cases where the debt or damages demanded do not exceed a certain sum has jurisdiction of a case in which the *ad damnum* is for that sum, although a larger one is alleged in the declaration: *Hapgood v. Doherty*, 8 Gray, 373. In a suit for damages to personal property, it is the amount of damages laid in the summons, or the declaration attached thereto, that fixes the jurisdiction, and not the verdict or amount of damages proved: *Velvin v. Hall*, 78 Ga. 136.

In *McVey v. Johnson*, 75 Iowa, 165, the court said: "The question of jurisdiction depends upon whether the amount in controversy is determined by the allegation as to the sum actually due or that sought to be recovered. We think the latter should determine the question. The amount claimed necessarily limits the amount of the recovery. If one sues in a court of competent jurisdiction to recover damages for the loss of a horse, alleging its value to be \$150, but claiming to recover damages only to the amount of \$125, he might recover that amount or any sum less than that, but could not recover more. The amount in controversy in that case would be the sum named, and the present case does not differ in principle from that. It is the amount in controversy, and not the items or matters out of which the claim arises, which confers or defeats jurisdiction, and that is to be determined by the sum which may be recovered in the action."

In determining the jurisdiction in an action for trespass to real estate, it is the amount claimed in the summons, and not the damage shown, which must

govern: *Stewart v. Baltimore etc. R. R. Co.*, 33 W. Va. 83; as it is the summons in justices' courts, like the writ in courts of record, that must be looked to to determine the plaintiff's claim upon the question of jurisdiction: *Todd v. Gates*, 20 W. Va. 464. In all actions sounding in damages, the amount named in the declaration, and not that found by the court or jury, determines the jurisdiction: *Murphy v. Howard*, 1 Hemp. 205. In a suit for damages for the breach of an official bond, the amount of damages claimed, and not the amount of the penalty in the bond, determines the jurisdiction: *Fowler v. McDaniel*, 6 Heisk. 529. So it is the value of property as alleged in a replevin suit, and not its value as found, that determines this question as between different courts: *Stevens v. Chase*, 61 N. H. 340; *Higgins v. Deloach*, 54 Miss. 498; *Kirkpatrick v. Cooper*, 89 Ill. 210.

Where plaintiff's demand consists of several distinct items, it is the aggregate which constitutes the sum demanded, and confers jurisdiction: *Moore v. Nowell*, 94 N. C. 286. And the actual value of the thing demanded determines the jurisdiction, and not the price last paid for it: *Oakey v. Aiken*, 12 La. Ann. 11.

The amount in controversy as fixing the jurisdiction of the court has further been determined as follows: In attachment proceedings, the amount of the judgment and costs, and not the value of the property attached: *Hoppe v. Byers*, 39 Iowa, 573; *Paul v. Arnold*, 12 Ind. 197; in actions for torts generally, the amount of damages claimed, and not the amount of damages suffered: *Linduff v. Steubenville etc. Co.*, 14 Ohio St. 336; *De Camp v. Miller*, 44 N. J. L. 617; *Cooke v. Woodrow*, 5 Cranch, 13; in an action on a bond, the sum claimed, and not the penalty in the bond: *United States v. McDowell*, 4 Cranch, 316; *Brown v. Shannon*, 20 How. 55. On the trial of an indictment for larceny, it is the value of the property as alleged in the indictment that determines the jurisdiction as between different courts: *State v. Church*, 8 Iowa, 252.

The only limitation or exception to the principles set forth is, that the demand for the sum made must be made in good faith: *Moore v. Nowell*, 94 N. C. 286. If it appears that the plaintiff erroneously and fraudulently stated his case in order to give the court jurisdiction, judgment should not be rendered in his favor, but his suit should be dismissed: *Wiseman v. Withersow*, 90 N. C. 140; *Griffin v. McDaniel*, 63 Miss. 121; *Fenn v. Harrington*, 54 Miss. 733; *Griffin v. Lower*, 37 Miss. 458; *Paul v. Burton*, 32 Vt. 155; *Fild v. Randall*, 51 Vt. 33. The rule has been thus stated: "Jurisdiction, so far as matter or amount in value is concerned, must be determined by the petition, and the question is concluded by its averments in so far as they relate facts in relation to the thing in controversy, unless it otherwise appears that an attempt has been made to confer jurisdiction by averments improperly and fraudulently made. In actions sounding in damages, the amount of damages claimed, and not the amount of the verdict, determines jurisdiction. In actions *ex contractu*, the amount claimed determines jurisdiction, if it is not made to appear that a fraud upon jurisdiction has been attempted by improper averments in the petition": *Dwyer v. Bassett*, 63 Tex. 274; *Ratigan v. Holloway*, 69 Tex. 488; *Tidball v. Eichoff*, 68 Tex. 68; *Bridge v. Ballen*, 11 Tex. 269; *Tarboas v. Kennon*, 3 Tex. 7; *Sherwood v. Douthit*, 6 Tex. 224.

If items are fraudulently included in a petition for the purpose of giving a certain court jurisdiction to which it is not entitled, the question can only be raised by proper averments presenting that issue: *Dwyer v. Bassett*, 63 Tex. 275; *Tidball v. Eichoff*, 68 Tex. 58.

Where the case admits of reasonable doubt as to whether the amount in controversy is within the jurisdiction, and where the plaintiff might have had reasonable grounds to believe that he could recover a sum within the jurisdiction, the suit will not be dismissed, as all intendments in a doubtful case are in favor of the jurisdiction: *Dwyer v. Bassett*, 63 Tex. 274.

The plaintiff must claim a sum sufficient to give the court jurisdiction, as it will not infer jurisdiction from the nature of the case: *Stephen v. Eismann*, 54 Miss. 535; *Wade v. Louder*, 30 La. Ann. 660; *Gougeant v. Anderson*, 20 Tex. 459. And if it appears from the pleadings that the real sum to which plaintiff is entitled is insufficient to confer jurisdiction, although a sufficient amount is claimed, the case should be dismissed: *Breider v. Krueger*, 76 Ind. 55; *Hunt v. Rockwell*, 41 Ind. 51; *Gamber v. Helben*, 5 Mich. 331. If the plaintiff *bona fide* claims an amount sufficient to give the court jurisdiction, and an unintentional error is discovered at the trial, which reduces the claim below that sum, the court need not dismiss the case: *Scott v. Moore*, 41 Vt. 205; 98 Am. Dec. 581. And a *prima facie* intention to evade the law, raised by a verdict for less than the jurisdictional amount, may be overcome by an affidavit of good faith on the part of the plaintiff: *Johnston v. Frances*, 13 Ired. 465.

When, by the pleadings, a claim is made for an amount in excess of the jurisdiction of the court, the case should be dismissed: *Stevens v. Goss*, 23 Minn. 520; *Hents v. Debertakauer*, 1 Me. App. 402; *McQuade v. O'Neil*, 15 Gray, 52; *Ball v. Biggam*, 43 Kan. 327, where the amount claimed in the bill of particulars was held to fix the jurisdiction. If the amount claimed by such bill is, however, within the limit of jurisdiction, the latter is not ousted, although the complaint claims an amount in excess thereof: *Second National Bank v. Hutton*, 81 Ind. 101.

As a general rule, it may be stated that when the principal sum claimed, exclusive of interest, is within the jurisdictional limit, the fact that accrued interest is due thereon, and that such interest and the sum claimed exceed the jurisdictional limit, does not deprive the court of jurisdiction, and judgment may be entered for the sum sued for, with the interest: *Trego v. Lewis*, 58 Pa. St. 463; *Hedgecock v. Davis*, 64 N. C. 659; *Jackson v. Whitfield*, 51 Miss. 202; *Inhabitants of Township No. 11 v. Weir*, 9 Ind. 224; *Wells v. Kartens*, 60 Ill. 117; *Bell v. Ayres*, 44 Conn. 35; *Solomon v. Rees*, 34 Cal. 23. A contrary rule is, however, asserted in *Butler v. Wagner*, 35 Wis. 54. It seems that the plaintiff cannot sue for both principal and interest, and thus confer jurisdiction when the principal alone is less than the jurisdictional limit: *Fisher v. Hall*, 1 Ark. 275.

The plaintiff may waive or remit his interest, and thus reduce his demand, for the purpose of bringing his claim within the jurisdiction of the court so as to recover judgment: *Raymond v. Strobel*, 24 Ill. 114; *Wright v. Smith*, 76 Ill. 216; *Evans v. Hall*, 45 Pa. St. 235; *Bower v. McCormick*, 73 Pa. St. 427.

Costs are not added to the principal sum sued for in determining the question of jurisdiction: *Watson v. Ward*, 27 Minn. 29. Where a note sued on provides for the collection of an attorney's fee in addition to the principal sum in case of suit, and such sum and fee together make an amount beyond the jurisdictional limit, the jurisdiction of the court is ousted: *Baxter v. Bates*, 69 Ga. 587.

It seems to be perfectly well settled that though the jurisdiction of a court is limited to a certain sum, and the original indebtedness sued upon exceeds that amount, still, the jurisdiction of the court is not ousted if the original sum has been reduced below the jurisdictional limits by *bona fide* credits:

Huguenin v. Nicholson, 1 Soam. 574; *Dillard v. Noel*, 2 Ark. 449; *Fowler v. Bishop*, 32 Conn. 199; *Peter v. Schlosser*, 81 Pa. St. 439; *Perkins v. Rich*, 12 Vt. 595. The jurisdiction is ousted, however, if the credits are feigned: *Todd v. Gates*, 20 W. Va. 464.

There is some controversy on the question whether or not the plaintiff can voluntarily remit part of his claim so as to bring the case within the jurisdiction of the court. In the following cases it was decided that he had a perfect right to do so, and the jurisdiction was sustained: *Carpenter v. Wells*, 65 Ill. 451; *Raymond v. Strobel*, 24 Ill. 453; *Wright v. Smith*, 76 Ill. 216; *Culley v. Laybrook*, 8 Ind. 285; *Long v. Bakesfeld*, 48 Ala. 608; *Hagood v. Doherty*, 8 Gray, 373; *Hempler v. Schneider*, 17 Mo. 258; *Matlack v. Lare*, 32 Mo. 292; *Fuller v. Sparks*, 39 Tex. 137; *Wilhelms v. Noble*, 36 Ga. 599; *Litchfield v. Daniels*, 1 Col. 268. While in the following cases the right was denied, and it was decided that the court could not thus obtain jurisdiction: *Peter v. Schlosser*, 81 Pa. St. 439; *Todd v. Gates*, 20 W. Va. 464; *Bower v. McCormick*, 73 Pa. St. 427; *Askew v. Askew*, 49 Miss. 301; *McDonald v. Dickens*, 58 Ga. 77.

Where the claim upon which suit is brought is one entire transaction or account, the plaintiff cannot split up the sum due thereon so as to give a certain court jurisdiction: *Mitroy v. Sparr Mountain etc. Co.*, 43 Mich. 231; *Fuller v. Sparks*, 39 Tex. 137; *Thompson v. Sutton*, 51 Ill. 213; *Lucas v. Le Compte*, 42 Ill. 303; *Askew v. Askew*, 49 Miss. 301; *Caldwell v. Beatty*, 69 N. C. 365; *Magruder v. Randolph*, 77 N. C. 79; *Ash v. Lee*, 51 Miss. 101.

If a party, however, holds several distinct notes or demands against the same party, he may bring separate suits on each of such notes or demands, and if the demand sued upon is within the jurisdictional limit, separate judgments may be rendered in each of such suits, although the aggregate amount thereof exceeds the jurisdiction: *Luce v. Shoff*, 70 Ind. 152; *Ash v. Lee*, 51 Miss. 101; *Wilson v. Mason*, 3 Ark. 494; *Collins v. Woodruff*, 9 Ark. 463; *Boyle v. Grant*, 18 Pa. St. 162; *Howard v. Mansfield*, 30 Wis. 75.

Different and distinct causes of action cannot, in a few of the states, be joined in one declaration so as to make the aggregate value claimed within the jurisdiction of a particular court: *Toledo etc. Ry Co. v. Tilton*, 27 Ind. 71; *Berry v. Linton*, 1 Ark. 252; *Nichols v. Hastings*, 35 Conn. 546; *Denison v. Denison*, 16 Conn. 34. Nor can different causes of action against different parties be thus joined: *Broadwell v. Smith*, 28 La. Ann. 172.

The limit of a court's jurisdiction generally applies as well to the amount of defendant's set-off as to the plaintiff's demand; and if the set-off is in excess of the jurisdictional limit, it cannot be allowed: *Milliken v. Gardner*, 37 Pa. St. 456; *Deihm v. Snell*, 119 Pa. St. 316. This rule has been denied in *Murphy v. Evans*, 11 Ind. 517; but this case is overruled by the subsequent case of *Pate v. Shaffer*, 19 Ind. 173; and in accordance with the general rule is *Derr v. Stubble*, 83 N. C. 539.

When, upon appeal, it appears that the claim in dispute was not within the jurisdiction of the trial court, the judgment will be reversed: *Collins v. Collins*, 37 Pa. St. 387; *McClure v. Lay*, 30 Ala. 208; *Butler v. Wagner*, 35 Wis. 64; *Coolan v. Bryant*, 36 Wis. 605; *Dartez v. Lege*, 28 La. Ann. 640; *McQuade v. O'Neil*, 15 Gray, 52.

The total omission of an *ad damnum* clause in the writ, or laying it too small, is a fatal defect after the rendition of judgment; but until the judgment is rendered, the writ may be amended by inserting a proper or sufficient sum to give the court jurisdiction: *McLellan v. Crofton*, 6 Me. 307; *Merrill v. Curtis*, 57 Me. 152; *Flanders v. Atkinson*, 18 N. H. 167; *Taylor v. Jones*, 42 N. H. 25; *Crugin v. Warfield*, 13 Met. 215. So the amount claimed

may be reduced in the trial court, by amendment, at any time before the rendition of judgment: *Converse v. Dumariscotta Bank*, 15 Me. 431; *Hurt v. Waitt*, 3 Allen, 532.

An amendment of the *ad damnum* clause has been allowed in the trial court, by increasing it to give the right of appeal: *Taylor v. Jones*, 42 N. H. 25; *Danielson v. Andrews*, 1 Pick. 156. The sum claimed, however, cannot be amended in the appellate court so as to give the lower court jurisdiction: *McQuade v. O'Neil*, 15 Gray, 52; *Ladd v. Kimball*, 12 Gray, 139. The amount claimed in the *ad damnum* clause determines the right of appeal, and not an erroneous judgment in excess thereof: *Hemmenway v. Hicks*, 4 Pick. 497; nor the amount set out in the declaration: *Chamberlain v. Ockrus*, 8 Pick. 522.

BELKNAP v. BALL.

[33 MICHIGAN, 523.]

LIBEL. — CRITICISM IN DISCUSSION; or as applicable in libel cases, a censure of the conduct, character, or utterances of the person criticised.

LIBEL. — CRITICISM OF OFFICIAL CANDIDATE. — When one becomes a candidate for public office, he thereby deliberately places his conduct, character, and utterances before the public for their discussion and consideration. They may be criticised according to the taste of the writer or speaker, and the law will protect them in so doing, provided their statements of or reference to the facts upon which their criticisms are based observe an honest regard for the truth. In such discussion the law gives a wide liberty. Within this limit public journals, public speakers, and private individuals may express opinions and indulge in criticisms upon the character or habits or mental and moral qualifications of official candidates.

LIBEL. — FALSE STATEMENT OF UTTERANCES OF OFFICIAL CANDIDATE. — A false and malicious published statement that a candidate for public office gave utterance, either in writing or in speech, to certain language, implying his ignorance and unfitness for office, is neither privileged criticism nor expression of opinion, but is libelous. Such statement is a statement of fact, for the falsity of which the publisher is answerable.

LIBEL. — FALSE STATEMENT OF UTTERANCES OF OFFICIAL CANDIDATE. — A false and malicious publication in a newspaper, in a coarse and blotted imitation of the handwriting of a candidate for office, purporting to be a fac-simile of the words, "I don't propose to go into debate on the tariff differences on wool, quinine, and all the things, because I ain't built that way. — Charles E. Belknap." or such publication of a report of a speech made by him in which he is made to give utterance to language to the same effect, is libelous.

LIBEL. — CHARACTER AND REPUTATION OF CANDIDATES for public office are protected from malicious attack by the same rules as are those of private individuals. Greater latitude is allowed in the case of the former than in the latter; and beyond this the same rule applies to both.

LIBEL. — PUBLICATION OF FALSEHOOD IS NEVER PRIVILEGED. No public interest can be subserved by its publication and circulation. If false statements are published in good faith, with an honest belief of their truth, damages may be reduced to a minimum. No other rule will protect the freedom of the press and the rights of individuals.

Taggart, Wolcott, and Ganson, and Butterfield and Keeney, for the appellant.

Blair, Kingsley, and Kleinhans, for the respondent.

GRANT, J. This is an action on the case for libel.

Plaintiff was a candidate for election to the office of representative in Congress. The first count in the declaration, after the usual allegations as to the character of plaintiff and his reputation among his neighbors, alleges that the defendant falsely, wickedly, and maliciously did compose, print, and publish, and cause to be composed, printed, and published, in the *Daily Democrat*, a daily newspaper having a large circulation in the district from which plaintiff was a candidate, and in other parts of the state, and also in the *Weekly Democrat*, the following libelous words: —

“I don’t propose to go into debate on the tariff differences on wool, quinine, and all the things, because I ain’t built that way.”

CHARLES E. BELKNAP.”

That said words were printed and published in a coarse and blotted imitation of the handwriting of the plaintiff, with certain of said words wrongly spelled and with an imitation of the genuine signature of the plaintiff below the words, thereby meaning that the plaintiff had written said words, and that they were written in the uncouth, blotted, and illy spelled form represented in the publication, and that said words as printed and published were a fac-simile of the words written and signed by the plaintiff.

The second count alleges that at a public meeting held in the city of Grand Rapids, plaintiff made a speech. The defamatory matter complained of is, that the defendant published in said paper a report of this speech, in which he said: “Mr. Belknap spoke first. He assured his neighbors that he was not there as a candidate begging for votes; . . . that he would refrain from discussing the tariffs on wool, quinine, etc., because, as he said, he was n’t built that way.”

The innuendo is, that defendant meant by this language that plaintiff was too ignorant and imbecile to discuss said question, or to express in a decent way his intention not to discuss it.

The defendant demurred, and as causes of demurrer says:

1. That the declaration does not allege that in said publication there was anything touching or affecting the moral character or integrity of the plaintiff; but that said publications

are complained of only in that they are calculated to convey the impression that plaintiff was a stupid, ignorant, and illiterate man, and too ignorant to discuss the tariff question; 2. That no reflection or suspicion is alleged in the declaration to have been caused by the defendant upon the moral character, integrity, probity, and uprightness of the plaintiff; 3. That defendant was justified in publishing the articles complained of, because the plaintiff was a candidate for public office, and, in the absence of anything touching the moral character, integrity, probity, and uprightness of the plaintiff, the matter stated in the declaration, and the innuendoes therein drawn, do not set forth a cause of action.

The demurrer was sustained by the court below. The demurrer admits the truth of all material facts alleged in the declaration, and which are well pleaded. It is proper to consider, first, what these admitted facts are. They are,—1. That the defendant published the statement; 2. That it was false and malicious, and done with the intention of injuring the plaintiff; 3. That defendant published the statement set forth in the first count in such a manner as naturally to induce the belief on the part of the reader that plaintiff actually wrote and subscribed the letter therein contained, and that in the second count the plaintiff actually used the words therein ascribed to him, and that they were published with the malicious intent to injure, and to induce the belief among the people that plaintiff was too ignorant to discuss the question of the tariff.

The gist of the argument on the part of the defendant is, that no moral obliquity, unsoundness of mind, impairment of natural faculties, mental or physical, is charged against the plaintiff; that neither his moral, social, nor religious education is attacked, but only his political and academical education; that nothing was published which, if entirely true or false, and believed, would prevent honest members of his own party from voting for him or constitute a reason or bar to his holding the office, if elected; that the alleged defamatory matter was within the domain of justifiable criticism, and is privileged, and therefore actionable malice will not be inferred, nor can it be predicated in law upon such criticisms or allegations.

I am not prepared to yield assent to the statement that all honest members of either political party would vote for a confessed ignoramus to represent them in Congress. The state-

ment bears its own refutation on its face, for it is apparent that these publications are made for the express purpose of preventing presumably honest members of the candidate's own political party, as well as others, from voting for him. Counsel omit in their statement one very important element, viz., intelligence. They would hardly be willing to assert that all honest, intelligent men would vote for a candidate of their party for an important office, who has confessed such ignorance as to show unfitness, although ignorance be no legal disqualification. If defendant's contention be correct, then one may publish of a candidate that he cannot read or write, or that he has confessed that he cannot. No one would seriously contend that such a publication would not be injurious and libelous, and that it would not deprive the candidate of many votes. To hold otherwise would be an insult to the intelligence of our people. Yet no moral turpitude or crime or legal disqualification is charged, and therefore no libel is uttered.

But why stop there, if disqualification is to be made the test? Conviction of crime is not by the constitution of the United States made a disqualification for the office of member of Congress. The only constitutional requirements are, that the member shall be twenty-five years old, seven years a citizen, and an inhabitant of the state where he is chosen. Aside from these, the House of Representatives is the judge of the qualifications of its members. There are many crimes for the conviction of which that body would not consider a member-elect disqualified; yet to publish of him, when a candidate, that he is guilty of such crime is admitted to be libelous, if not true. Public journals are in the performance of a high duty when they truthfully place such charges before the public. To illustrate, that one has been a gambler does not disqualify him for the office. He may have reformed and become an exemplary citizen. But the fact that he has been a gambler is proper to be placed before the people. The electors are the ones to determine whether they wish such a man to represent them in Congress. Their verdict in his favor would undoubtedly be held conclusive of his right to the office. Disqualification to hold the office cannot therefore be made the test to determine the libelous character of the publication.

Criticism is a discussion, or as applicable in libel cases, a censure, of the conduct or character or utterances of the per-

son criticised. When one becomes a candidate for public office, he thereby deliberately places these before the public for their discussion and consideration. They may be criticised according to the taste of the writer or speaker, and the law will protect them in so doing, provided that in their statements of or reference to the facts upon which their criticisms are based they observe an honest regard for the truth. In such a discussion the law gives a wide liberty. Within this limit public journals, speakers upon the hustings, and private individuals may express opinions, and indulge in criticisms upon the character or habits or mental and moral qualifications of official candidates: Cooley on Torts, 217. This is the freedom of the press guaranteed by the constitution,—a freedom necessary for the protection of the liberties and the proper enlightenment of the people. When the facts are truthfully written or spoken of a candidate's character and conduct, they then become known to the reader and hearer, as well as to the writer and speaker. Both go before the people together, and they can seldom be misled, and the candidate cannot be injured within the meaning of the law. The same reasoning and rule applies to the utterances of a candidate when they are truthfully stated. But a statement that he gave utterance, either in writing or in speech, to certain language is neither criticism nor expression of opinion. It is a statement of fact, for the truth of which the publisher is responsible. When language is truthfully stated, the criticism thereon, if unjust, will fall harmless, for the former furnishes a ready antidote for the intended poison. Readers can then determine whether the writer has by the publication libeled himself or the candidate. When the language is falsely and maliciously stated, privilege ceases to constitute a defense. The case of *Walker v. Tribune Co.*, 29 Fed. Rep. 827, is a good illustration of this principle. Walker had published a pamphlet, and the defendant, in its newspaper, spoke of it as "plainly the effusion of a crank." It was held that the word "crank" is not in itself actionable; that it has no necessary defamatory meaning; and if it is used in a defamatory sense, such sense must be given by an appropriate innuendo. As a criticism, although it underrated the author's talents, it was not libelous: *Bronson v. Bruce*, 59 Mich. 471; *McAllister v. Detroit Free Press Co.*, 76 Mich. 358; 15 Am. St. Rep. 318; *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 257; *Wheaton v. Beecher*, 66 Mich. 310.

The character and reputation of the candidate for public

office should be protected from malicious attack by the same rule as are those of private individuals. Greater latitude is allowed, undoubtedly, in the one case than in the other. Beyond this the same rule applies to both. The correct and reasonable rule is stated in *Crane v. Waters*, 10 Fed. Rep. 619, as follows: "The modern doctrine . . . appears to be, that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man . . . with more freedom than they can take with a private matter. . . . In such discussions they are not held to prove the exact truth of their statements and the soundness of their inferences, provided that they are not actuated by express malice, and that there is reasonable ground for their statements or inferences, all of which is for the jury."

In *Wheaton v. Beecher*, 66 Mich. 310, Mr. Justice Sherwood, in delivering the opinion of the court, says: "There is no doubt that when a man in this country becomes a candidate for an office, elective or appointive, his character for honesty and integrity, and his qualifications and fitness for the position, are put before the people, and are thereby made proper subjects for comment, and that publications of the truth in regard to the candidate are not libelous; and it is equally true that the publication of falsehood against such candidate is wrong, and deserves to be punished."

Justice certainly demands that in these discussions one should not transcend the bounds of truth, for, in addition to the commission of a private wrong, great public injury might result: *Foster v. Scripps*, 39 Mich. 379; 33 Am. Rep. 403. In my judgment, a more potent reason exists for the observance of truth in such a case than in publications respecting private matters.

Publications of falsehoods are never privileged. No public interest can be subserved by their publication and circulation. If statements, though false, are published in good faith, and with an honest belief of their truth, the damages may be reduced to a minimum. No other rule will properly protect the freedom of the press and the rights of individuals. In the language of one of the authorities: "The only safe rule to adopt in such cases is to permit editors to publish what they please, in relation to character and qualifications of candidates for office, but holding them responsible for the truth of what they publish."

There may be difficulty in distinguishing between justifi-

able criticism and actionable misrepresentation, but this does not affect the rule. In such cases the jury must determine the question under the proper instructions. None of the cases cited by counsel for defendant, or in the opinion of the learned circuit judge, are at all similar in their facts to those of the case at bar. In none of them did the publication charge the plaintiff with having written or spoken certain language which in fact he did not use. These cases generally go no further than to hold that matters of opinion are not libelous. In my judgment, until courts are prepared to hold that ignorance constitutes no unfitness for office, they must hold the publication set forth in the first count as libelous. If such a letter were written by the plaintiff, it would show him to be ignorant, illiterate, and incapable to perform intelligently his duties as a member of Congress.

The character of the language set forth in the second count depends upon the meaning of the words "I ain't built that way." The innuendo says that defendant meant that plaintiff was too ignorant and imbecile to discuss the question, or to express in a decent way his intention not to discuss it. The province of the innuendo is to explain and give meaning to ambiguous language. If extrinsic evidence is required to ascertain its meaning, the jury must determine that question: *Bourresau v. Detroit Evening Journal Co.*, 68 Mich. 425; 6 Am. St. Rep. 320. The meaning of these words as used in the context is certainly not clear. The demurrer, for the purposes of this case, admits both the meaning supplied by the innuendo and the malice charged. When all the facts are placed before the court and jury upon the trial, the question whether or not the publication was libelous will be presented for their determination. The declaration makes out a case proper to be submitted upon the facts which may be shown by the evidence.

The judgment must be reversed, with costs of both courts, and the case remanded for further proceedings.

LIBEL — CANDIDATES FOR PUBLIC OFFICE. — As to what publications made concerning candidates for public office are libelous, and what are not, see *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84, and particularly note 88 et seq.; note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 349, 350.

WELCH v. TRIBUNE PUBLISHING COMPANY.

[33 MICHIGAN, 681.]

JURY AND JURORS — RIGHT TO REMOVE JUROR WITHOUT CAUSE. — A court has no right of its own motion to reject a qualified juror with whom the parties are satisfied, unless for sufficient cause, which must appear in the record.

LIBEL — EVIDENCE — MALICE. — In an action of libel against a newspaper publisher for charging that a jury perjured themselves in returning a verdict, evidence on the part of the plaintiff as to whether or not any influence other than that of the evidence and the instructions and arguments of counsel was brought to bear upon him as a juror in the consideration and conclusion of his verdict is immaterial, and inadmissible to show malice.

LIBEL — EVIDENCE OF MALICE. — In an action of libel against the publisher of a newspaper for charging that a jury perjured themselves in rendering a verdict, evidence that a written request, signed by all the jurors, requesting such publisher to make a retraction, is admissible to show malice, upon proof that such request reached such publisher.

LIBEL — EVIDENCE OF JUSTIFICATION. — In an action of libel against the publisher of a newspaper for charging that a jury perjured themselves in rendering a verdict, evidence that other newspapers published in the place where the verdict was rendered severely criticised the action of the jury as extraordinary is admissible in justification.

LIBEL — EVIDENCE OF MOTIVE FOR VERDICT. — In an action of libel by a juror against a publisher of a newspaper for charging that a jury perjured themselves in rendering a verdict, the plaintiff, as a witness in his own behalf, cannot be compelled, on cross-examination, to state his motives or reasons for finding the verdict.

LIBEL OF JURY. — A newspaper publication charging that a jury have perjured themselves in rendering a verdict is libelous.

LIBEL — REPUBLICATION AS EVIDENCE OF MALICE. — The republication of a newspaper article, after the commencement of an action charging it to be libelous, with comments thereon by the defendant, may be evidence of malice.

W. H. H. Russell, for the appellant.

John Atkinson, for the respondent.

CHAMPLIN, C. J. The plaintiff brought an action of trespass on the case against defendant for libel.

In June, 1889, the plaintiff was summoned to appear in the recorder's court of the city of Detroit as a talesman to serve as a juror in the trial of Nelson Brule, then about to be tried upon an information charging him with assaulting, with intent to kill and murder, Ida Corneau. He was examined as to his qualifications, and admitted and sworn as a juror in the cause. After hearing the testimony, the arguments of counsel, and the charge of the court, the jury retired to consider

the case, and after being absent a short time, they returned into court, and reported that they found Brule was not guilty.

The next day the Detroit Tribune, published by the defendant, contained an editorial, reciting the circumstances of the alleged attempted killing, and animadverting severely upon the jury for having returned such a verdict, which it characterized as outrageous. The libelous words charged in the declaration read as follows: "Every little while the popular faith in our boasted system of trial by jury gets a tremendous wrench by the rendition of a specially outrageous and idiotic verdict on the part of twelve prize jackasses who get into the jury-box. Such an event happened in Detroit yesterday."

The article then went on to state as follows:—

"Some time ago one Nelson Brule, a young married man with a family, concealing that fact, proceeded to 'make love' to a young lady of good family and character, and so far enlisted her affections as to secure her tacit consent to a proposal of marriage. While she was delaying, in order to become assured that her suitor's parents would take kindly to her,—a very natural hesitation on a prudent young lady's part,—she learned the true condition of Brule's domestic affairs, and then refused to have anything further to do with him. A few days after she had made this announcement to him, he called on her again, saying that he was going home, and asking her to see him off on the train, and bid him good by. This impudent proposition she declined, but weakly consented to walk down the street with him. While doing this he suddenly seized her around the neck, placed a pistol to her head, and fired. She screamed, staggered, and fell, and supposing he had accomplished his murderous intent, he put another ball into his own head,—unfortunately where it did n't do the most good. Both persons recovered, and the would-be murderer has been on trial in the recorder's court for the last three days on a charge of assault with intent to murder, the following citizens of Detroit composing the jury: Thomas Hurst, M. P. Christian, Henry M. Bailey, H. A. Marks, Thomas Griffin, Joseph Atkinson, James Keligher, Charles M. Welch, G. B. Noble, Charles F. Ferris, Morgan Lacey, Samuel Furguson.

"We have narrated in brief the plain facts of the case, about which there is not the slightest controversy. The defense set up was emotional insanity. Here was a man attempting for months to persuade a young girl to marry him, which, had he succeeded, would have involved the crime of bigamy on his

part. If that was not his real intention, only one other object is supposable in his case, — that of the crime of his victim's seduction. Either purpose brands him a deliberate villain. There was nothing emotional about this intelligent hunting of an innocent girl. But when, foiled in his dastardly and devilish efforts, he seeks to murder the object of his long pursuit, twelve men are found to acquit him on the ground that he was insane just at the moment of committing the act. By this verdict he is turned loose in the community to repeat his venture, if he chooses, if he can go where his identity and history will not be known.

"No wonder that a general outburst of indignation has followed the rendition of such an outrageous verdict. Every young woman's life in Detroit is rendered less secure by the result of this trial. Every villain is encouraged to believe his chances of escape bettered if he plots against the happiness, the virtue, and the life of an innocent girl. If there seems to be anything out of the way in these few feeble remarks, charge it up to emotional insanity."

A few days after, another article appeared in the paper, under the heading "This is Encouraging," and, commenting on and commending a coroner's jury who found that the deceased "came to his death through an assault made upon his person by John Cook," added: "The infamous Brule jury and the scarcely less censurable coroner's jury in the Crawford case are quite enough of that kind of verdict-makers. An outraged and indignant public wants no more of that sort. The toughs and crooks of Detroit have hitherto had altogether too much liberty, and too many friends in court."

Later, another article appeared, which purported to report the proceedings of a religious meeting at the Casino Tabernacle, in which a speaker said: "You are all under sentence of death. There is no jury which is going to perjure themselves and let you off, as one did in this city a few weeks ago."

These articles were all counted upon as libelous in plaintiff's declaration. The defendant pleaded the general issue, and gave notice that it would insist upon the truth of the articles published, as a defense to the action. The trial resulted in a verdict for defendant.

The first assignment of error relates to the action of the court in excusing the juror Joseph G. Campau, who was called and examined by counsel of both parties, who announced themselves as satisfied with him as a juror. The court, with-

out a challenge being interposed, and without stating any cause or reason therefor, excused the juror, against the protest of the plaintiff. We do not think the judge has a right to reject a qualified juror with whom the parties are satisfied, unless for sufficient cause; and such cause should appear upon the record: *Pearce v. Rogers*, 2 Post. & F. 137. The circuit judge is not invested with any right of peremptory challenge. He can excuse for cause, but the cause must be stated, so that it may appear of record: Proffatt on Trial by Jury, sec. 140. The exercise of the power to discharge a juror by the circuit judge of his own volition is not a matter of discretion. It must be based upon some cause. It will not do to hold that a circuit judge may, without assigning any reason, discharge jurors at his mere will or caprice. If he may so discharge one juror, he may discharge a dozen, and compel parties, after they have exhausted their peremptory challenges, to accept such a jury as he is satisfied with. Counsel for defendant contends that the record does not show that plaintiff was prejudiced, and that the presumption is in favor of judicial action. The record does disclose that the juror was one of the regular panel, and it further discloses that talesmen were resorted to in order to fill the panel which tried the cause. The law has provided measures for the selection and return of jurors to serve in the trial of causes, and a party has a right, if there be no legal objection to the jurors so returned, to have his cause tried by jurors so selected, unless rejected in a manner provided by law.

Upon the trial of the cause, the plaintiff took the witness-stand, and testified in his own behalf. He stated that he heard all the evidence in the case, the arguments of counsel, and the instructions of the court, after which the jury retired to the jury-room, to consider the evidence and agree upon a verdict; that they were out something over an hour, and returned into court with a verdict of not guilty. He was then asked by his counsel: "Was there any other influence than that of the evidence and the instruction of the court and the arguments of counsel brought to bear upon you as a juror in the consideration and conclusion of your verdict?" This was objected to as immaterial, and excluded. Error is assigned upon the ruling. The ruling was correct. No such fact was in issue.

A request in writing, signed by all the jurors, asking the Tribune to make a retraction, was then shown to the witness,

and he testified that he signed it, and requested it to be presented to the Tribune people for retraction of the article. Counsel for defendant objected to it being received in evidence. The court decided to admit it, but that it should not be read unless it was shown to have reached the defendant. This ruling is excepted to, and alleged as error. Plainly, it was not error. Moreover, the parties had stipulated in writing the fact that a request in writing was made upon the defendant to retract the alleged libelous articles, and that no retraction had been made. No attempt was made to identify this as the request which was presented.

Witness was permitted to be asked, against plaintiff's objection, if there were publications in all of the newspapers in Detroit in regard to the verdict rendered in the Brule case, and that if in all of them the action of the jury was severely criticised; and error is assigned upon the rulings. We think the latitude permitted upon the cross-examination by the court was not an abuse of discretion. The verdict was characterized as extraordinary, and the testimony tended to show that the public regarded it as such.

He was asked, upon cross-examination, the following question: "Mr. Welch, you say that after hearing the evidence and the charge of the court in that case, the jury retired to consider their verdict. Now, was the verdict that was rendered in that case the verdict you agreed upon in your jury-room?" The question was objected to by counsel for plaintiff as incompetent and immaterial, and "because the stipulation shows what the verdict was, and because section 7608, Howell's Statutes, especially provides that 'no juror shall be questioned for any verdict rendered by him, nor shall he be subject to any action, civil or criminal, on account of such verdict, except by indictment for corrupt conduct in rendering such verdict in cases prescribed by law.' And further, because no such matter is alleged in the defendant's plea of justification."

The objection was overruled, and the witness answered, "Yes, sir." He was further interrogated, and was permitted to testify, against the same objection, that he rendered the verdict because he thought it was right, under the evidence produced there, and the charge of the court; that he acquitted Brule on the ground of insanity, and in regard to shooting himself; that he did not think Brule shot at her at all; that

he fired a pistol close to her head, according to the evidence. These rulings are assigned as error, and the counsel for the plaintiff contends that all such testimony elicited by interrogatories to this witness, who was a juror, is incompetent, and privileged by the statute above quoted. The authorities cited by counsel in support of his position all relate to the incompetency of the oaths of jurors as to what took place in the jury-room while considering their verdict, tending to impeach the same. Such authorities are not based upon the section cited: *Pierce v. Pierce*, 38 Mich. 416; *People v. Knapp*, 42 Mich. 271; *Hewett v. Chapman*, 49 Mich. 4; *Churchill v. Circuit Judge*, 56 Mich. 538. This provision of the statute grew out of the abolition of the common-law remedy of attaint, and the supplanting of that harsh procedure by the granting of new trials in civil cases; and to understand what is meant by the expression "no juror shall be questioned for any verdict rendered by him," it is proper to refer briefly to the proceeding by attaint, which was abolished when this statute was enacted.

In the early method of trial by jury in England, from whose growth our present system has developed, the jury were composed of witnesses to the transaction submitted to them, and could rarely give a wrong verdict without at the same time committing perjury. New trials before another jury to correct a wrong verdict had not yet become the practice of the courts, and the only way of correcting such evils was by attaint. The party who alleged a wrong verdict was entitled to the process of attaint, by which he obtained a writ summoning the twelve jurors, who rendered the verdict, and twenty-four other jurors, called the "grand jury," who should consider the matters submitted to the first twelve, or petit jury. The record and proceedings of the former trial were read to them; the trial judge explained the matters in dispute upon which it was alleged a wrong verdict had been rendered, and the individual jurors who had joined in the verdict were questioned concerning the grounds of their decision; and if the grand jury found a different verdict than the former jury, they were attainted, and were immediately arrested and imprisoned, their lands and chattels were forfeited to the king, and they became unworthy of credit, and incompetent to give testimony or to sit upon a jury; their wives and children should be turned out of their houses, which were to be

demolished, and their trees and meadows destroyed; and this continued to be the punishment until 23 Hen. VIII., c. 3 which substituted pecuniary penalties upon the jurors. It is said in *Bac. Abr.*, tit. *Juries*, M, that attaint "is only disused and not taken away." It was, however, abolished in England by statute 6 Geo. IV., c. 50 (1825). It will be seen that it came to us as a part of the common law, but was abolished by the Revised Statutes of 1838, in the following language: "Attaints upon untrue verdicts are abolished, and for any verdict rendered by him, no juror shall be questioned, or be subject to any action or proceeding, civil or criminal, except to indictment for corrupt conduct in rendering such verdict, in the cases prescribed by law": R. S. 1838, pt. 3, tit. 1, c. 5, sec. 34.

This was followed by the Revision of 1846, which reads the same as *Howell's Statutes*, sec. 7608. Viewed in the light of the common law and the remedy interposed by statute, it is quite plain what the meaning and construction of the statute is. Attaints for untrue verdicts are abolished. It then proceeds to forbid what had before been the practice at common law,—the questioning of any juror for any verdict rendered by him. The questioning referred to was part of the proceeding against the juror for a false verdict. The whole section is a prohibition against any prosecution of a juror for a false verdict at the suit of a party, or by the people, except for corrupt conduct in rendering the verdict. The object of the statute is to place jurors beyond the reach of a powerful or malicious adversary, and protect them in the honest and fair discharge of their duty without fear or favor.

It would be small protection if any defeated party in a lawsuit could, through the public press, or otherwise, libel and traduce a juror, and say to him: "You must submit to the ruination of your character, or if you seek legal redress, twelve other men will sit in judgment upon your motives and conduct in rendering the verdict you did."

What was done in this case was to question the juror for the verdict rendered by him as an untrue verdict, and he was called upon to give the reasons and grounds of it; and the correctness of the verdict, and the sufficiency of the testimony to produce conviction in the mind of Welch and his fellow-jurors, was again tried before another jury as fully, to all intents and purposes, as if the proceedings by attaint had not

been abolished. It can make no difference that the alleged libel is justified by plea. Justification is a good defense, but it must be proved by legal and competent evidence. The shield which the statute throws around jurors from being questioned and from suit for any verdict rendered by them cannot be broken or thrown aside for the purpose of trying the truth of the verdict rendered. The statute seeks to protect the rights of the public and of parties by proceeding against a juror who has been guilty of corrupt conduct in rendering a verdict by criminal prosecution.

The conduct of jurors is not above criticism either by the public press or private parties. No political, judicial, or administrative department of the government is beyond criticism. But just criticism is not libelous; neither is severe criticism. But to charge that a jury have perjured themselves in rendering a certain verdict is libelous. It may appear in a criminal case, to a person not acting under the responsibility of an oath, from the facts and circumstances developed at the trial, that the accused is guilty, and ought to be convicted. Yet to the juror sitting upon the trial, every fact and circumstance must be consistent not only with the guilt of the accused of the crime charged, but the evidence must be of such character and weight as to leave no reasonable doubt of his guilt in the mind of the jury. How are such questions to be tried in a libel suit charging perjury, under a plea of justification and truth of the charge? What nicely poised scales do the second jury possess which shall enable them to enter the domain of conscientious conviction or reasonable doubt in the minds of the first jury, and weigh them to ascertain whether they have violated their oaths?

What has been said has application solely to the question under consideration; that is, to the right of defendant, in a case like this, to question a juror concerning a verdict rendered by him, or to inquire of him his motives or reasons for finding such verdict. This is sufficient for the present case. We think the question, and those succeeding it in the same direction, should have been excluded.

We think the court erred in excluding an article appearing in defendant's paper, after suit was commenced, in which the article charged as libelous was republished and comments made. It was offered to show that the defendant entertained malice against plaintiff, and was admissible for that purpose.

For the errors pointed out, the case must be reversed, and a new trial granted.

LIBEL — NEWSPAPER PUBLICATIONS. — As to what publications by a newspaper concerning judicial proceedings are allowable and what are not, see note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 361-368.

NEWSPAPER LIBEL. — For a full and complete discussion of the law of newspaper libel generally, see note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-360.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

ZIMMER v. SETTLE.

[124 NEW YORK, 37.]

BOND TO HUSBAND FOR WIFE'S SEPARATE SUPPORT INVALIDATED BY HER RETURN TO HIM. — Where a person gives to a husband, whose wife has left him and commenced an action against him for a limited divorce and for support, a bond conditioned that he will support the wife and save the husband from all further liability therefor, he is not liable on such bond for money paid by the husband for necessities supplied to the wife after she returns to her husband and permanently resumes her membership of his family as his wife, even though the reconciliation be not wholly complete nor the conjugal relation entirely restored. Such return and resumption put an end to the contract represented by the condition of the bond.

ACTION upon a bond given by the defendants to the plaintiff. The bond was conditioned to properly support, maintain, clothe, board, furnish with all the necessities of life in sickness and in health, the wife of the plaintiff during the term of her natural life, and to forever save him entirely harmless and exempt from any further support of her, or from annoyance, suits, costs, or claims on account of her during the term of her natural life. The defendants were the father and brothers of plaintiff's wife. After the return of plaintiff's wife, as stated in the opinion, the plaintiff was required to pay, and did pay, for some clothing which she obtained for herself on his credit; and he supported her. On the trial, the court directed a verdict for the defendants, and on appeal to the supreme court the judgment was affirmed. Other facts are stated in the opinion.

C. A. Clark, for the appellant.

Alexander Cumming and R. F. Bieber, for the respondents.

BRADLEY, J. The bond, when made and delivered, became a valid obligation of the defendants, and their defense is dependent upon the circumstances and effect of the return of the wife to her husband's house and home, and her continuance there. The evidence did not justify the inference of any breach of the condition of the bond while the wife remained with them and before her return to the plaintiff, in July, 1879. By the terms of that instrument, the duty assumed by the defendants to provide for the wife and take care of her is not qualified by any circumstances or made subject to any conditions expressed in it. But it may be observed that at the time the contract was entered into she had left her husband, and been absent from him six months, and there was then pending her action against him for a separation and alimony, which could be supported only on the ground of ill-treatment of her by her husband of a serious character. It evidently was then contemplated by the plaintiff and the defendants that the wife would not return to her husband, but would continue to live separated from him, and it was in view of such separation the bond was made and taken. This is also indicated by the recital in it that differences had arisen between the husband and wife, and that she had commenced an action against him for a limited divorce for her support. It may be assumed that the contract resulting in the giving and accepting the bond was entered into in reference to such situation, which is entitled to consideration in the determination of the purpose and effect of the instrument. This does not require any modifications of its provisions, but has relation to the application of the language used to the subject within the contemplation of the parties as represented by the situation then existing and the surrounding circumstances, which it may be assumed they then had in view: *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Blossom v. Griffin*, 13 N. Y. 569; *Juilliard v. Chaffee*, 92 N. Y. 529.

The occasion which led to this contract and obligation between the parties was the separation of the wife from her husband, and such was the sole cause for entering into it. It cannot be assumed that there was any purpose to, in that manner, make provision for her care and support as a member of the plaintiff's family. Such an obligation for that pur-

pose evidently was not in the mind of the parties. Nor was it contemplated that she would return to and live with the plaintiff, but, on the contrary, it was understood that the situation then existing in that respect would continue, and in that view the parties acted in contracting for and making the obligation. Any other view seems to be contrary to their apparent purpose, and repugnant to reason. The primary duty to take care of and support a wife is with the husband, and it cannot be supposed, unless the circumstances clearly require such conclusion, that he intends, while she is living with him, to deny himself that right, relieve himself from all responsibility in that respect, and to devolve the performance of that duty wholly upon another. In the present case, the existing separation upon which the contract was founded justified it at the time it was made. But when the wife returned to the house of her husband to live, and lived with him there, resuming permanently her membership of his family as his wife, the cause which led to the contract ceased to exist. Articles of separation between husband and wife, in which another joins with her as trustee, although valid when made, are rendered void by resumption by them of their conjugal relation: *Shelthar v. Gregory*, 2 Wend. 422; *Carson v. Murray*, 3 Paige, 483.

It is, however, urged that there was in this instance no reconciliation in the sense requisite to annul articles of separation; that, at all events, the court could not properly hold, as matter of law, that it was so, because there was evidence tending to prove that the husband did not consent to her return, and did not receive and fully cohabit with her as his wife. While there is evidence to that effect, it appears that his relations of cohabitation with her were substantially the same as they were for considerable time before she left his house. There were no articles of separation in this instance, nor had the wife entered into any agreement to that effect with her husband. She was therefore, without the fault of the husband or of the defendants, at liberty to seek to make her husband's home hers. The defendants had no right or lawful power to prevent her doing so. And any undertaking on their part to prevent the restoration of conjugal rights or relations of the husband and wife would have been void as against public policy. They therefore had no right against her consent to take her away from the plaintiff's house. Her purpose evidently was to remain there, and he permitted her

to do so. It is difficult to see how he could properly do otherwise. This view is as favorable to the contention of the plaintiff in that respect as can be taken. As between her and the plaintiff, it was the right of the wife to return to her husband's house and insist that it was her home, and it was his duty to provide for her there, unless by her conduct she had forfeited that right. This is not claimed. She was not required to respect any arrangement made between her husband and another party for her provision and care elsewhere. This was one of the contingencies which was not only not provided for by the terms of the contract between the parties, but was not subject to the control of either. And when the resumption of her home with the plaintiff could be considered permanent, a situation would be produced not provided for by the contract or within its contemplation when it was made. The situation would be such that the plaintiff could realize no benefit from the undertaking assumed by defendants, and they would not be required to attempt to induce her to leave her husband and go to their house to receive support, nor would they be justified in seeking to do so without the consent of the husband. The consequence would be, that the contract as represented by the condition of the bond would cease to be effectually operative for the purposes of the burden or benefit of its performance, for reasons, resulting from the default of neither, produced by a cause over which none of the parties to it had any control which they could legally exercise. And that situation, when accomplished, would put an end to the contract and the obligation made pursuant to it, and the plaintiff be entitled to reimbursement of the consideration paid by him: *Hildreth v. Buell*, 18 Barb. 107; *Jones v. Judd*, 4 N. Y. 412. The defendants, after the return of the wife to her husband to remain there, took that view of the matter, and through a third person proposed to the plaintiff to repay to him the four hundred dollars, and by their answer alleged their readiness to do so. The further performance by the defendants of their obligation, within its meaning and purpose, required a separation of the wife from the husband, and her removal from his home. This could not effectually be made the subject of contract between these parties, and it would be no less unlawful for them to execute such a purpose without her consent. It would be repugnant to the policy of the law pertaining to the marital relations, rights, and duties of husband and wife. And it was through the exercise of her right

that the wife sought and obtained the home of her husband and children and his care and support. Thus the purpose of the defendants' bond seemed to have been defeated.

It is, however, contended on the part of the plaintiff that the duty of the defendants to care for and support the wife, and indemnify the plaintiff from expense and liability in that behalf, was no less after her return to her husband than while she was living separate from him, unless their reconciliation was, as between themselves, complete, so that they fully resumed their conjugal relations. This proposition is in disregard of the apparent relation and other considerations arising from it. It is, however, not entirely clear what is essential to reconciliation in its application to the present case, if it did not exist between the plaintiff and his wife. It does not depend upon any particular degree of reciprocal affection or esteem. As between persons in such relation, it may arise from appreciation and observance by them of their marital duty to each other. The husband and wife in this instance not only resided in the same house, and had done so for nearly six years at the time of the trial, but they, during that time, with their children, ate at the same table; they were friendly and kind to each other, and, with no apparent difference in that respect, occupied separate sleeping-rooms, as they had for two years before. The wife was partially blind; and in no condition to do housework, and the evidence tends to prove that she took no charge of it. It would be a step in advance, without support of sound policy, to hold that as between the husband and third persons the rights of the latter could not rest upon his apparent relations with his wife while they are living together.

The husband, while living with his wife, may be treated by third persons as assuming the rights, duties, and liabilities incident to the marital relation; and to a reasonable extent her authority to use his credit may be presumed in behalf of those not advised to the contrary: *Emmett v. Norton*, 8 Car. & P. 506; *Keller v. Phillips*, 39 N. Y. 351. And this is not confined to actual necessities for herself, as is the case when the wife is justifiably living apart from him. The credit of the husband, used by the wife under such circumstances, might create as against him greater liabilities than those with which the defendant would be chargeable upon their undertaking. This is only one reason why the apparent relation between the plaintiff and his wife was not consistent with the performance

of their covenant. They were not advised by the plaintiff, or otherwise, that it was other than it appeared to be by the fact that the plaintiff and his wife were living together; and for the purpose of the question here their apparent, in view of its uninterrupted continuance, must be deemed their actual relation. The situation is different from what it would have been if the wife had left the defendants' house and went to a place other than the house of her husband to live. Then a question would have arisen which requires no consideration here. She, in that case, would have resumed no relation to the plaintiff which would have cast upon him, as between him and the defendants, any duty, apparent or real, to relieve them from the obligation they had assumed, as he did not undertake that she should remain at the house of the defendants.

The view taken renders it unnecessary to consider the consequences of breach by the defendants of their obligation in respect to the rule of damages, and whether they be partial and limited to such as were sustained prior to the commencement of the action, or also prospective and final.

The most that can be claimed by the plaintiff in support of his motion to amend his complaint by inserting allegations with a view to a recovery of the consideration paid to them is, that the ruling of the court upon it was discretionary. The disposition of the motion is not therefore the subject of consideration on this review. And as the action as represented by the cause alleged in the complaint did not proceed with that view, the question whether the plaintiff was entitled to reimbursement from the defendants of the amount paid to them as the consideration of their obligation, or any portion of it, did not arise for determination upon the trial.

These views lead to the conclusion that none of the exceptions were well taken.

The judgment should be affirmed.

HUSBAND AND WIFE. — Validity and effect of deeds and agreements between husband and wife for separation: See *Stephenson v. Osborne*, 41 Misc. 119; 90 Am. Dec. 358, and note 367-370; *Clark v. Foodick*, 118 N. Y. 7; 16 Am. St. Rep. 733, and note.

HUSBAND AND WIFE. — BOND FOR SEPARATE MAINTENANCE OF WIFE. — If after separation of husband and wife in pursuance of an agreement the wife returns and becomes a member of her husband's family, the agreement to live separate is ended, and the bond given for the separate maintenance of the wife falls with the agreement: Note to *Stephenson v. Osborne*, 90 Am. Dec. 369.

**CARPENTER v. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.**

[124 NEW YORK, 82.]

MONEY IN CLOTHING OF PASSENGER IN SLEEPING-CAR NOT IN CUSTODY OF COMPANY. — Money in the clothing of a passenger in a sleeping-car, worn during the day, and placed under his pillow at night, cannot be considered as in the custody of the railway company, and it will not be liable for the loss of such money without some evidence of negligence on its part.

DUTY OF RAILWAY COMPANY TO PROTECT PASSENGERS IN ITS SLEEPING-CARS. — A corporation engaged in running sleeping-coaches with sections separated from the aisle by curtains only is bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. While not an insurer, it must exercise diligence to protect its sleeping customers from robbery, and is bound to use a degree of care commensurate with the danger to which they are exposed.

EVIDENCE SUFFICIENT TO REQUIRE QUESTION OF DEFENDANT'S NEGLIGENCE TO BE SUBMITTED TO JURY. — Evidence that the plaintiff purchased and was assigned to the lower berth of an ordinary sleeping-car run by the defendant; that on going to bed at night he placed his pocket-book, containing money, in the inside pocket of his vest, which he put under his pillow; that on waking in the morning he found the money had been stolen from the pocket-book; that the upper berth, which had been occupied by a stranger when he went to bed, was unoccupied when he woke in the morning; that the only person employed on the sleeper, which ran over an important thoroughfare, and made stops at several large cities during the night, was a man who acted as conductor and porter, and blacked the passengers' shoes for his own profit; that this man's closet was at one end of the car, from which a full view of the main aisle could not be had, — is, in the absence of explanation or evidence by the defendant, sufficient to require the question whether the plaintiff's loss was caused by the defendant's negligence to be submitted to the jury.

ACTION to recover money alleged to have been stolen from the plaintiff while traveling as a passenger on one of the defendant's sleeping-cars. The plaintiff testified that upon being assigned to his berth at half-past ten o'clock at night, he undressed, and placed his pocket-book, containing forty dollars in money, in his inside vest pocket, and then placed that garment under the pillow next to the window. When he awoke about six o'clock in the morning he found the vest under the pillow next to the passage-way, but the money had been stolen. When plaintiff went to bed, the berth over his was occupied by a stranger, but it was unoccupied when he rose. At the close of the plaintiff's evidence, the defendant declined to offer any evidence, and the city court, at the trial

term, dismissed the complaint, on the ground that the defendant was neither liable as an innkeeper or as a common carrier, and that there was no evidence of negligence. This order was affirmed by the general term of the city court, which latter judgment was reversed by the general term of the court of common pleas for the city and county of New York. Other facts are stated in the opinion.

Henry W. Taft, for the appellant.

Jabish Holmes, Jr., for the respondent.

FOLLETT, C. J. Money necessary for the payment of the expense of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, and if lost while in the custody of a carrier for transportation, it is liable: *Merrill v. Grinnell*, 80 N. Y. 594; *Fairfax v. New York Cent. etc. R. R. Co.*, 73 N. Y. 167; 29 Am. Rep. 119; 2 Redfield on Railways, 59. But carriers do not undertake to carry and safely deliver the effects of travelers not delivered into their custody, and it cannot be held that money in a passenger's clothing worn during the day and placed under his pillow at night is in the custody of the corporation which carries and furnishes travelers with berths in sleeping-coaches: *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 58 Am. Rep. 185; 2 Rorer on Railways, 887.

The mere proof of the loss of money by a passenger while occupying a berth does not make out a *prima facie* case, and to sustain a recovery, some evidence of negligence on the part of the defendant must be given.

The negligence complained of is, that none of the defendant's employees were continually on guard in the car in a position to observe the movements of all persons in the passage-way between the sections.

A corporation engaged in running sleeping-coaches with sections separated from the aisle only by curtains is bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers: *Pullman Car Co. v. Gardner*, 3 Penny. 78.

These cars are used by both sexes of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers, they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties

to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous. Did the plaintiff give evidence which would have authorized the jury to have found that the defendant did not discharge this duty to the plaintiff? The car in which the plaintiff rode was constructed with a passage-way through the center, with sections on each side, each section containing two berths. These sections were separated from each other by movable wooden partitions, and from the aisle by two curtains, which were closed when a berth was occupied. At one end of the car was a toilet for women, shut off from the passage-way by a swinging door. On one side of the other end of the car was a toilet for men, opposite to which was the porter's closet. A full view of the main aisle could not be had from all parts of the space at the end last described. The train stopped at eight cities to take up and set down passengers, staying at New Haven twelve minutes, and at Springfield four.

The undisputed evidence is, that the entire force employed on the sleeper, which ran over an important thoroughfare, and made frequent stops, was one man, who acted as conductor, as porter, and was also engaged, for his own profit, in blackening the shoes of the passengers. Whether this employee had that part of the sleeper which is for the common use of passengers and the servants of the corporation constantly in view during the trip is not shown by the evidence, except inferentially. The facts hereinbefore referred to — that the car ran over an important route between two great cities, through and stopping at eight considerable ones, that but one person was employed on the car, the services rendered by him for the defendant, and those which he was at least permitted to render to passengers for his own profit — affirmatively appear, and in addition it may well be presumed that he assisted passengers in entering and leaving the coach at intermediate stations. The existence of these facts was not denied, nor was any explanation of them offered. The defendant gave no evidence. Under the circumstances, the evidence was sufficient to put the defendant to proof of the care which it took of the occupants of the sleeper on this trip, and in the absence of any explana-

tion on its part, it was sufficient to require the question whether the loss was caused by the defendant's negligence to be submitted to the jury.

The order should be affirmed, and judgment absolute rendered against the appellant, with costs.

SLEEPING-CAR COMPANIES — RIGHTS, DUTIES, AND LIABILITIES OF: See *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 673, and note 876; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 5 Am. St. Rep. 31, and note. A railway passenger traveling in the coach of a sleeping-car company, who sustains an injury through the negligence of such company, may maintain an action therefor against the railroad company: *Railroad Co. v. Walrath*, 38 Ohio St. 461; 43 Am. Rep. 433; and see *Thorpe v. New York etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; *Kinsley v. Railroad Co.*, 125 Mass. 54; 23 Am. Rep. 200; *Louisville etc. R. R. Co. v. Katzenberger*, 16 Lea, 380; 57 Am. Rep. 232.

NEGLECTOR, SUBMISSION OF QUESTION OF, TO JURY. — The question of negligence ought not to be taken from the jury, unless the conduct of the plaintiff, relied on as amounting in law to contributory negligence, is established by clear and uncontradicted testimony: *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387.

NEGLECTOR — WHAT EVIDENCE IS SUFFICIENT TO ESTABLISH: See *Reesevold v. Arrol*, 44 Minn. 395; 20 Am. St. Rep. 584, and note 586.

BREWER v. NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY.

[124 NEW YORK, 50.]

EMPLOYEE OF ONE EMPLOYER CANNOT, WITHOUT HIS ASSENT, BE MADE TO ASSUME HAZARDS OF SERVICE CONDUCTED BY ANOTHER. — A person entering into a contract of service with one employer may not, without his knowledge or assent, be made to assume the hazards of a service conducted by another, and in which he is not engaged, and thus be personally subjected to the consequences of the negligence of the latter, without remedy against him.

LIABILITY OF RAILROAD COMPANY FOR DEATH OF EXPRESS MESSENGER RESULTING FROM ITS NEGLIGENCE. — A railway company is liable for its negligence resulting in the death of an express messenger carried on its road free, under a contract between it and the express company, in which it is stipulated that in no event, whether of negligence or otherwise, shall the railway company be responsible for property carried by it free of charge, where there is no evidence that such messenger had any knowledge of the provisions of the contract. When he entered the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that he took upon himself the risks of injury he might suffer from the negligence or fault of the railway company.

ACTION to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the defendant's negligence. The facts are stated in the opinion.

D. C. Robinson, for the appellant.

Frederick Collin, for the respondent.

BRADLEY, J. The plaintiff's intestate was an express messenger in the service of the United States Express Company, and, as such, occupied the express-car in a train upon the defendant's railroad on January 23, 1881, when a portion of the train, including such car, was derailed, and he lost his life. The jury found that this was occasioned solely by the negligence of the defendant. The principal ground alleged by way of defense was, that the defendant was exempt from liability by virtue of an agreement made between the Erie Railway Company and the express company, in 1877, to the rights of that railway company, in which and to its franchises the defendant had succeeded. That was a contract for the transportation of property for the express company, and for that purpose the railway company agreed to provide suitable facilities.

The third clause of the contract, upon which the main question for consideration arises, was as follows: "The railway company agrees that between all stations on its main and leased lines and branches it will carry, free of charge to said express company, its messengers, wagons, horses, and grain, not exceeding three car-loads in any one month, and, as well, all packages of money, bank notes, bonds, gold, bullion, jewelry, and other precious articles, including the safes in which such packages shall alone be transported; and in consideration of such free carriage said express company hereby assumes all transportation risks and other liabilities whatsoever arising in respect thereof, and agrees to fully indemnify and protect the railway company therefrom."

This provision, in its relation to property which the railway company should transport pursuant to the contract, did not have the effect to relieve or indemnify it against liability for loss or injury which should be occasioned by its negligence. The intent to accomplish that purpose cannot be inferred from general words, but must be distinctly expressed in the contract with the common carrier: *Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28; *Nicholas v. New York etc. R. R. Co.*, 89 N. Y. 370.

It is said that this provision of the contract, in its application to the express messenger referred to in it, is not entitled to such application and effect; and that by it the defendant was exempt from liability for his personal injury and death, although caused by its negligence. It is true that a carrier of persons is not subjected by law to the obligations of a common carrier, nor is a carrier of persons a common carrier in the strict sense of the term applicable to it. While the latter, in the transportation of property, is an insurer of its safe transit, when the obligation is not qualified by contract, the negligence of the carrier of persons is essential to liability for injury to them. The settled doctrine in this state is, that a carrier of persons as well as of property, and known as a common carrier, may, by contract, have protection against liability for injury caused by its negligence: *Wells v. New York etc. R. R. Co.*, 24 N. Y. 161; *Bissell v. New York etc. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369; *Poucher v. New York etc. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364. But whether in view of the fact that the liability of a carrier to a passenger can rest on no ground less than that of negligence renders it unnecessary to make the stipulation of the contract definite and distinct in that respect for its relief from liability, is not necessarily the subject of inquiry or consideration on this review. It may, however, be observed that in those cases where the defense has been sustained, the contract has, by its terms, plainly guarded the carrier against liability for injury resulting from its negligence. The provision before mentioned of the contract contains no stipulation expressly exempting the railway from liability arising from that cause. But in a later clause of the contract it was provided that "the railway company agrees to assume the usual responsibility of railway companies in transporting express freights, such responsibility being, however, expressly limited to cases of negligence in running and handling its trains. But in no event, whether of negligence or otherwise, shall the railway company be responsible, and it is hereby released from, and the express company hereby assumes, all liability for money, bank notes, jewelry, bullion, and precious packages hereinabove provided to be carried by the railway company free of charge."

This is the only provision of the contract specifically expressing any relief from the consequences of the negligence of the last-named company; and it may be that its protection from liability from such cause was intended to be limited by and

made dependent upon that clause. And in that view the provisions of the third clause of the contract may have been intended to furnish the means of indemnity to the railway company, so far as the express company assumed the risk and undertook to indemnify and protect it from liability. These considerations bear upon the construction of the last-mentioned provision of the contract; and if the messenger had been advised of it, the question may have arisen whether, in its application to him, the liability of the defendant would be deemed to have been any less qualified than in its relation to the property to which, in common with him, it there related. That is to say, whether the general words, apparently applied to the property and to him without discrimination, were entitled to a more extended import as to the messenger than could be given to them in their application to the other objects to which they, in the same connection, also equally related. It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employee of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation: *Missouri Pacific R'y Co. v. Ioy*, 71 Tex. 409; 10 Am. St. Rep. 758. He was lawfully in the car, having the charge of the property and business there of the express company under its employment; and although he paid no fare to the defendant, was carried by virtue of no contract made by him personally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily, by that fact, chargeable with notice of the provisions in question of the contract. Presumptively, he was entitled to protection against personal injury by the negligence of the defendant: *Blair v. Erie R'y Co.*, 66 N. Y. 313; 23 Am. Rep. 55; *Nolton v. Western R. R. Corp.*, 15 N. Y. 444; 69 Am. Dec. 623; *Smith v. New York C. R. R. Co.*, 24 N. Y. 222; 29 Barb. 132; *Collett v. London & N. W. R'y Co.*, 16 Ad. & E. 984. And it is not seen how Brewer could, without his knowledge or consent, be placed in such relation to the defendant as to relieve it from liability to him for the con-

sequences of its negligence affecting him personally. His contract of employment with the express company for its service did not, so far as appears, impose upon him such hazards, nor was he chargeable with the stipulations in the contract between those companies except so far as they, through notice to him or otherwise, entered into that, pursuant to which he went into or remained in the service of the express company. The negligence of the defendant was the violation of its duty. It was the want of the care to which the plaintiff's intestate was entitled for his protection. This duty and such right did not depend or rest upon contract, but upon the relation as carrier of the plaintiff, and the care which the defendant as such was required to exercise. It is violated duty that furnishes the ground of an action for negligence, and where there is no duty there is no liability for such cause. We are unable to see in principle any legal support for the proposition that a person entering into a contract of service with one employer may, without his knowledge or assent, be made to assume the hazards of a service conducted by another, and in which he is not engaged, and be personally subjected to the consequences of the negligence of the latter, without remedy against him. No such question was in the case of *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75, which arose out of the same disaster.

The contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger. Nor did the defendant take from it any right to disregard such duty. But whatever right to relief from the consequences of its negligence in that respect the defendant derived from the contract arose by way of indemnity upon the stipulations of the express company. These views lead to the conclusion that the question of negligence (which fact was supported by evidence) was properly submitted to the jury. And the charge of the court to them, "that the extent of the defendant's obligation to the deceased was to use ordinary care," was as favorable to the defendant as could be required by it. The deceased was a passenger, and therefore the refusal of the court to charge to the contrary was not error: *Blair v. Erie R'y Co.*, 66 N. Y. 313; 23 Am. Rep. 55. The location of the express-car in the train did not deny to him the benefit of that relation.

No other question requires consideration.

The judgment should be affirmed.

MASTER AND SERVANT — Risks assumed by servant: *Nadau v. White River Lumber Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and cases collected in note 41.

MASTER AND SERVANT — **NEGLECT** — A servant in the general employment and pay of one railroad company, but engaged in special services for another, through an agreement between the two companies, may recover of the company for whom such special services are performed for an injury received by reason of its negligence: *Missouri etc. Ry Co. v. Jones*, 75 Tex. 151; 16 Am. St. Rep. 879.

NEGLECT, **CONTRACTS EXEMPTING FROM LIABILITY FOR** — Contracts stipulating for exemption from liability for negligence are not favored in law, and should be strictly construed, with every intendment against the party seeking their protection: *Orew v. Bradstreet Company*, 124 Pa. St. 161; 19 Am. St. Rep. 681, and note 683. Without an express exemption provided by contract, a railroad company is liable for an injury caused by its negligence to a passenger lawfully on its train, although he pays no fare, as, for instance, the messenger of an express company: *Blair v. Erie Ry Co.*, 66 N. Y. 313; 23 Am. Rep. 55, and note; see also *Lamon v. Chancellor*, 68 Mo. 240; 20 Am. Rep. 799.

CLARK v. DEVOR.

[124 NEW YORK, 120.]

COVENANT, RULE FOR INTERPRETATION OF — The primary rule for the interpretation of a covenant contained in a deed is to gather the intention of the parties from their words, by reading, not simply a single clause, but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met.

EASEMENT ATTACHED TO LAND BY PLAIN AND DIRECT LANGUAGE ONLY — It is only by the use of plain and direct language of a grantor that it can be held that he has created a right in the nature of an easement in land and attached it to one parcel as the dominant estate, and made the other servient thereto for all time to come. The creation of such a right will not be inferred by a forced construction of a covenant, nor by any amplification of its language beyond its natural meaning. Where, therefore, the owner of two adjoining city lots conveys one of them by a deed in which he covenants, for himself, his heirs, executors, administrators, and assigns, to and with the grantees, his heirs, executors, administrators, and assigns, that he will not erect or cause to be erected on said lot any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance, this covenant must be regarded as personal to the grantor, and solely against his own acts, and will not make him liable for the acts of his grantees or of subsequent owners, provided he neither does such acts himself nor causes them to be done.

ACTION to recover damages for the breach of a covenant contained in a deed from the defendant to the plaintiff's grantor. The covenant was in these words: "And the said

Moses Devoe, being also the owner of the adjoining lot known and distinguished as No. 22 Tenth Street, for himself, his heirs, executors, administrators, and assigns, does hereby covenant, to and with the said party of the second part, his heirs, executors, administrators, and assigns, that he will not erect or cause to be erected on said lot, No. 22 Tenth Street, any building which shall be regarded as a nuisance or which shall be occupied for any purpose which may render it a nuisance." A building was erected upon the lot, which was afterwards converted into a livery-stable, and so used, according to the verdict of the jury, as to constitute a nuisance. Upon the trial of this case, it appeared that the defendant neither caused nor permitted the nuisance, but that it was created and maintained by his grantees and their lessees, without his consent. The trial court rendered judgment upon a verdict in favor of the plaintiff. The general term of the supreme court reversed this judgment, and the plaintiff appealed. Other facts appear from the opinion.

David Gerber, for the appellant.

Freling H. Smith, for the respondent.

VANN, J. This is not an action in equity to restrain the continuance of a nuisance, nor in tort to recover the damages caused by a nuisance, but is simply for a breach of the covenant set forth in the foregoing statement. It is not brought against one who personally, or through his agents or tenants, created the nuisance, nor against one who owned the property at any time when the nuisance existed thereon, but against a former owner of two city lots, who, in selling one, many years ago, made said covenant with reference to the other, which he soon conveyed away, and since then he has had no interest in either. The covenant, therefore, is not only the foundation of the plaintiff's claim, but is the limit of the defendant's liability. It is not denied that the plaintiff had a remedy for the nuisance against those who caused it, independent of any covenant, but this action depends strictly upon the covenant, and can be maintained only by showing a breach thereof.

A covenant is simply a contract of a special nature, and the primary rule for the interpretation thereof is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement, but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered

when their minds met: *Quackenboss v. Lansing*, 6 Johns. 49; *Duryea v. Mayor etc.*, 62 N. Y. 592, 597; *Western New York Ins. Co. v. Clinton*, 66 N. Y. 326; Platt on Covenants, 136.

The deed under consideration is in the ordinary form, except that between the *habendum* clause and the usual covenants contained in modern conveyances the paragraph in question was inserted, consisting of a single sentence. This covenant is purely negative in character, and has no relation to the land conveyed, but relates wholly to other premises owned by the covenantor, and in which the covenantee had no interest. There was no agreement that the premises should not be used for certain purposes, or that they should be free from nuisances forever. There was no corresponding covenant by the grantee restricting the use that he might make of the premises conveyed to him, so that the restrictions might be mutual, and uniformity of use thus secured. No special object to be attained by the covenant is apparent, because both parcels of land were tenement-house property, situated on a back street and surrounded by buildings of an inferior character.

In construing the covenant, it is to be observed that the grantor, although speaking for himself and his successors, to the grantee and his successors, confined the restriction to himself alone, by agreeing that he, the grantor, would neither erect nor cause to be erected any building that should be regarded as a nuisance. According to the literal, and hence natural, interpretation of this language, the parties meant that the grantor should not personally do or cause to be done any of the inhibited acts. No doubt could arise as to the correctness of this construction, if the parties had not agreed in behalf of themselves and their assigns. The substance of the covenant, however, is limited to the covenantor, and purports to restrict his action only. While the capacity in which he assumes to contract is in behalf of himself and others, the actual contract, or the thing agreed not to be done, is limited to his own acts. Clearly, the inconsistency cannot be dispelled by subordinating substance to form, or by holding that the actual agreement is of less importance than the capacity in which it was made.

The learned counsel for the plaintiff contends that the covenant should be read distributively, or as if the grantor had written: "I covenant for myself that I will not build, etc., I covenant for myself, my executors and administrators, that neither I nor they will so build, and I covenant for my s-

signs that they will not so build"; but the objection to such a construction is, that it requires something to be inserted that the grantor never assented to. He did not agree that his executors, or his administrators, or his assigns should not build, but only that he would not build. He used no words that connected any one except himself with the restriction against building, or that imposed an obligation in that regard upon any other person. It was not a general covenant "not to erect," as in *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400, but a special covenant that the grantor would not erect, showing an intention to contract against the acts of one person only.

While effect should be given to every word of a written instrument, if possible, it is necessary sometimes to reject a part as surplusage; and it is never allowable, in order to prevent that, or to effect any other result, to insert that which the parties did not agree to. A personal covenant binds the heirs, executors, and administrators in respect to assets, so that the word "assigns" only need be rejected as surplusage, in order to relieve the case of all difficulty. A strained construction that has no foundation to rest upon except the single word "assigns," used in the descriptive and unsubstantial way already mentioned, should not be resorted to when it involves a serious result to the grantor with but slight benefit to the grantee, because it is improbable that, under such circumstances, such a result was intended. Hence only by the use of plain and direct language of the grantor should it be held that he created a right in the nature of an easement and attached it to one parcel as the dominant estate, and made the other servient thereto for all time to come. We think that the language used by the parties permits no such result. We agree with the learned general term that the construction contended for by the plaintiff "would be giving a scope to the covenant far beyond what the language used requires, and beyond what the grantees of lot No. 22 had a right to assume in accepting a conveyance of that lot. An encumbrance affecting lot No. 22 for the sole benefit of lot No. 24, and in a conveyance of lot No. 24, into which a purchaser would hardly look for encumbrances upon lot No. 22, will not be inferred by a forced construction of the covenant, or any amplification of its language beyond its natural meaning."

In *London etc. Ry Co. v. Bull*, 47 L. T. Rep. 418, upon

which the plaintiff relies, the title of the grantee and his lessees was subject to the covenant. The entire language used by the contracting parties, and the circumstances surrounding them when they contracted, showed an unmistakable intention that the restriction should be permanent, and apply to any one who owned or occupied the land. The grantee was the covenantor, and the court did not hold him liable on his covenant for the acts of his assigns, but awarded an injunction against the owners and occupants. While we are unable to concur in all that was said by the court in that case, we do not regard the result as opposed to the principle of our judgment upon this appeal.

In *Norman v. Wells*, 17 Wend. 136, the defendant was held liable upon the ground that the act claimed to have been a violation of the covenant was his own act, "of which he is annually receiving the avails by way of rent."

We think that the covenant in question was personal to the defendant, and was solely against his own acts; that it did not make him liable for the acts of his grantees or of the subsequent owners; and that as he neither did the acts complained of, nor caused them to be done, no cause of action was established against him.

The order should be affirmed, and judgment absolute rendered against the plaintiff, with costs.

CONTRACTS, CONSTRUCTION OF, GENERALLY: *Davis v. Robert*, 89 Ala. 402; 18 Am. St. Rep. 126, and note 130. It is the duty of the court to so construe a deed as to carry out the intent of the parties making it, if no legal obstacle lies in the way: *Bassett v. Budlong*, 77 Mich. 336; 18 Am. St. Rep. 404, and note 409.

EASEMENT—CONSTRUCTION OF GRANT.—The construction of a grant of a right of way cannot be aided by parol negotiations, but the language of the grant itself, when uncertain or ambiguous, must be regarded in the light of surrounding circumstances and the situation of the parties: *Herman v. Roberts*, 119 N. Y. 37; 16 Am. St. Rep. 800. And see, as to construction of grants of easements, *Emans v. Turnbull*, 2 Johns. 313; 3 Am. Dec. 427; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188.

NOYES v. ANDERSON.

[124 NEW YORK, 175.]

COURT OF EQUITY HAS POWER TO RELIEVE PARTY AGAINST FORFEITURE and from penalty incurred, without willful neglect on his part, by the breach of a condition subsequent, upon the principle of equity jurisprudence that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression. A mortgagee, for a good consideration, agreed not to foreclose his mortgage, which was then due, until one year after the mortgagor's death, provided that during said period prior mortgages on the same property, which, with his mortgage, exceeded its value, remained unforced, and no interest thereon remained unpaid for more than thirty days after due, "and so long as no taxes or assessments on the said premises remain unpaid and in arrears for more than thirty days." Through the failure, but not willful neglect, of the mortgagor's agent, with whom, she being absent, she had left money sufficient to make payment, a sewer assessment remained unpaid for more than thirty days. But upon learning this fact the mortgagor promptly paid the assessment the day before the summons was served upon her in an action to foreclose the mortgage. *Held*, that she should be relieved from the consequences of her default in the payment of the assessment.

ACTION to foreclose a mortgage. The defendant, in her answer, set up the agreement referred to in the opinion. The trial court directed judgment for the plaintiff, which was reversed by the general term of the court of common pleas for the city of New York, and the plaintiff appealed. Other facts are stated in the opinion.

Thomas Allison, for the appellant.

Charles Donohue, for the respondent.

BRADLEY, J. The agreement of October 2, 1885, by which the plaintiff agreed that no proceedings should, upon certain conditions, be taken to enforce the bond and mortgage during the life of Mrs. Anderson, and for one year thereafter, was founded upon a good consideration; and inasmuch as she had been in default in payment of the sewer assessment more than thirty days at the time of the commencement of this action, the main question is, whether she was, under the circumstances, entitled to relief against the consequences of such default. At the time the agreement was made, the principal sum secured by the bond and mortgage had become due and payable. The prior mortgages, amounting to twenty thousand dollars, with that held by the plaintiff, amounted to a sum exceeding the value of the premises, so that the only value of the equity of redemption to the defendant was in the observ-

ance of the plaintiff's agreement to postpone the foreclosure of the mortgage. In view of those circumstances, and of the fact that the defendant was known to be insolvent, it is evident that the purpose of the agreement was to protect her equity of redemption. This was her estate in the premises, and the right to her enjoyment of it was wholly dependent upon the forbearance of the foreclosure of the plaintiff's mortgage, provided no action should be taken on the prior mortgages. And the arrangement resulting in the agreement was made to enable her, so far as the observance of its provisions permitted, to have the benefit of such estate during her life. The right, therefore, to maintain this action to foreclose the mortgage was dependent upon the failure of the defendant to perform some condition in the agreement, and a forfeiture of her right to the further protection under it of her equity of redemption.

The power of a court of equity, in cases properly requiring it, will be exercised to relieve a party against forfeitures and from penalties. And this is upon the principle of equity jurisprudence, that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression. The doctrine was applied to relieve a mortgagor from the forfeiture to which he was subjected, and an obligor from the penalty with which he was chargeable by the common law on default. It is also not only available to cases of leases, where forfeiture of the term and entry are provided for as the consequences of non-payment of rent on the day it becomes due, but is extended to other cases, and more especially to those (although not necessarily confined to them), where the default resulting in forfeiture is in payment of money, as in such case adequate compensation can be made: Pomeroy's Eq. Jur., secs. 433, 450, 451. This relief will not be afforded in cases where the default and forfeiture have been occasioned by the willful neglect of the party seeking it. Nor will it ordinarily be given where the breach is of a condition precedent, although that rule may not be without exception. In the present case, the default was in the performance of a condition subsequent, because the right of the plaintiff under the contract vested on its delivery, subject to the provision that it should be avoided or rendered ineffectual by a subsequent breach of the conditions, or any of them, upon the observance of which the defendant's right given by the contract depended. And the defeat of such right by her default, which

the plaintiff by this action seeks to make available for the foreclosure of the mortgage, would result in a forfeiture from which, or the consequences of it, the court, upon the principle before mentioned, may have relieved the defendant, if in other respects she was entitled to the interposition of its equitable powers for that purpose. The stipulation of the plaintiff's agreement essentially differs, in its nature and object, from a provision in a mortgage to the effect that the principal sum shall become due on a specified default in the payment of interest as provided by it. In the latter case, provision is so made for the time when the principal sum may become due, and that time is regulated by an event which may or may not occur, so far as it is dependent upon the default of the mortgagor. The consequence so produced is not deemed a forfeiture. The result is, maturity of the principal debt at the time, not definitely fixed, when the mortgage is made, but specifically stipulated for in that instrument. And in such case the court, as a rule, will not grant relief to the mortgagor from the effect of his default, when nothing is done on the part of the mortgagees to render it unconscionable for him to avail himself of it: *Noyes v. Clark*, 7 Paige, 179; 32 Am. Dec. 620; *Malcolm v. Allen*, 49 N. Y. 448; *Bennett v. Stevenson*, 53 N. Y. 508. But the case at bar must be considered and determined in the light of the undisputed facts and circumstances under which the agreement was made, and in reference to the purpose represented by it. The money secured by the mortgage was due at that time. The parties made no stipulation modifying the terms of the bond and mortgage, nor in terms extending the time of payment, although the right to pay it would exist while foreclosure was suspended. Payment, evidently, was not contemplated. Nor was the mere extension of the time of payment of the mortgage debt the object or purpose of the agreement. And the conditions which the defendant was required to perform were independent of such debt, and did not embrace the payment of any part of it. The purpose was to obtain and give protection to the defendant's estate, consisting of her equity of redemption, that she might have the beneficial enjoyment of it during her life, subject only to certain conditions to be by her performed. The primary purpose of the arrangement represented by the agreement was to secure to Mrs. Anderson, for such time, so far as it would have that effect, the estate she then had in the premises, which could not be retained by her without the suspen-

sion of the foreclosure of the mortgage. The effect, therefore, given to her default by foreclosure of the mortgage would be the forfeiture of her estate in the premises, and no less so, under the circumstances, than would be that of a tenant of his term by entry of his landlord for non-payment of rent pursuant to a provision in the lease.

In *Giles v. Austin*, 62 N. Y. 486, which was a case of that character, Judge Rapallo, in delivering the opinion of the court, said: "The cases in which relief has been denied are either where the lessee has willfully committed some affirmative act in violation of his covenant or been guilty of some default the precise damage for which cannot be ascertained by any rule. But where the covenant is simply for the payment of money, the forfeiture is regarded as security merely for such payment, and equity will not allow it to be enforced after the party has obtained all that it was intended to secure to him." So in the present case, the purpose of the condition, subject to which the right of the defendant was taken and to be held under the agreement, was, not to permit the increase of the amount of the prior mortgages by the accumulation of interest upon them, or allow charges for taxes and assessments to remain on the premises. This was the extent of the requirement, and it may necessarily be supposed that the consequences which the contract permitted to result to her from default were intended to secure the accomplishment of such purpose. The case, so far as relates to the nature of the agreement and its object, comes within those to which the equitable doctrine before mentioned may properly be applicable: *De Forest v. Bates*, 1 Edw. Ch. 394; *Atkins v. Chilson*, 11 Met. 112; *Hagar v. Buck*, 44 Vt. 285; 8 Am. Dec. 368.

The sewer assessment of \$23.08 had been standing upwards of a year when this action was commenced, and when the defendant's attention was called to it, the assessment was promptly paid the day previous to the service on her, at Chicago, of the summons and complaint. The trial court found that the previous non-payment of it was owing solely to the negligence of the defendant's son, an agent, Henry S. Anderson. The facts bearing upon that subject are undisputed. There is nothing in the evidence to permit the inference that the defendant did not intend to promptly pay all taxes and assessments on the property. She left that matter in charge of her son, who resided in the city, and she was away from there. He paid the taxes in 1886, and had in his hands the

defendant's money with which to pay such charges, and sufficient to pay the assessment during the time it remained unpaid, and the only reason of his failure to pay it was, that he did not know that it was made or existed. It appears that he might have ascertained about it at the office of the clerk of arrears. But when he paid the tax of 1886, at the tax-office in the city, the son was, upon his inquiry, informed by some one in the office that there was no sum due or in arrears against the property.

It is clear that the purpose of the defendant's son was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not willful neglect on his part, nor was the plaintiff prejudiced by it.

The plaintiff is entitled to all the inferences properly deducible from the evidence, as well as the benefit of the facts found upon it, in support of the judgment of the special term, as it must be assumed that it was reversed by the general term on questions of law only, since nothing in the decision appears to the contrary. But we think, upon undisputed evidence, and in view of the facts as found by the court, the case was one in which the defendant, Anderson, was entitled to equitable relief, and that the absolute denial of it to her was error. The defendant may properly have been chargeable with some costs. And in view of the situation, neither party should have costs of the special term.

The order should be affirmed, and judgment absolute directed for the defendant to the effect that she be relieved from the consequences of her default in the payment of such assessment, with costs of the appeal to the general term and in this court.

PARKER, J. (dissenting). A stipulation that a debt, the payment of which is secured by a mortgage on real estate, shall become due and the security foreclosable upon the failure of the mortgagor to pay interest as it falls due or the taxes assessed on the mortgaged premises, is neither a penalty nor a forfeiture, and a court, in the absence of fraud on the part of the mortgagee, cannot relieve the mortgagor from the consequences of his neglect to pay according to the terms of his contract: Jones on Mortgages, secs. 77, 1180-1182; Wilkie on Mortgage Foreclosures, secs. 43-47; Thomas on Mortgages, sec. 228; and the cases cited in the sections of the text-books referred to. The stipulation gave an extension of credit, its continuance until one year after defendant's

death being made dependent on the non-foreclosure of prior mortgages, the payment of interest within thirty days after maturity, and taxes and assessments within thirty days after the same shall be in arrears. From the failure to pay taxes or assessments the court can no more relieve a party than from the failure to pay interest, which it cannot do in the absence of fault on the part of the mortgagee: *Hale v. Gouverneur*, 4 Edw. Ch. 207; *Spring v. Fisk*, 21 N. J. Eq. 175. 178; *Ferris v. Ferris*, 28 Barb. 29; *Bennett v. Stevenson*, 53 N. Y. 508. It is not asserted that the mortgagee here was in fault. The defendant merely attempts to excuse her neglect. A similar attempt was made in *Ferris v. Ferris*, 28 Barb. 29, but without avail.

Order affirmed, and judgment accordingly.

FORFEITURES ARE NOT FAVORED IN EQUITY, and are never enforced if couched in ambiguous language: *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187. Nor are forfeitures favored in law: *Gutther v. Mutual Aid Ass'n*, 40 La. Ann. 776; 8 Am. St. Rep. 554.

FORFEITURES WILL BE RELIEVED AGAINST IN EQUITY, when it can be done without violence to the contract rights of the parties: *Hall v. Delaplaine*, 5 Wis. 206; 68 Am. Dec. 57, and note 85; *Blair v. Chamblin*, 39 Ill. 521; 89 Am. Dec. 322.

PEARSALL v. WESTERN UNION TELEGRAPH CO.

[134 NEW YORK, 256.]

TELEGRAPH COMPANY'S DUTY IN TRANSMISSION AND DELIVERY OF MESSAGES. — When a telegraph company receives, without conditions, a message for transmission, among other obligations implied is the duty to accurately transmit and deliver to the addressee the message received. It does not insure the accurate transmission and delivery of the message, but it undertakes to exercise due diligence to accurately transmit and deliver it.

PRIMA FACIE EVIDENCE OF NEGLIGENCE IN FAILING TO PROPERLY DELIVER TELEGRAPHIC MESSAGE. — In an action against a telegraph company to recover damages for failing to accurately or promptly deliver a message, the plaintiff makes out a *prima facie* case of negligence against the company by proving the contract and its breach, without giving evidence of any negligent act of omission or commission on the part of the company or of its agents.

SHARE-HOLDER IN CORPORATION NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE OF RESOLUTIONS OF ITS DIRECTORS. — A share-holder in a corporation is not chargeable with constructive notice of resolutions adopted by its board of directors, or of provisions in its by-laws regulating the mode in which its business shall be transacted with its customers; and when he deals with the corporation as a customer, his rights

are in no wise limited by its regulations or by-laws not brought to his knowledge.

MEASURE OF DAMAGES FOR FAILURE TO PROPERLY DELIVER TELEGRAPHIC MESSAGE. — Where a member of a firm of stock-brokers delivers to a telegraph company a message directed to his firm, ordering it to buy certain shares of stock, but the operator negligently transmits the message directed to such member of the firm individually, in consequence of which the message remains unopened until his return home the next day, when he purchases the shares at an advanced price, in an action against the company for the negligent transmission of the message, the measure of damages is the difference between the price paid for the shares and that for which they would have been bought the day before, had the message been accurately transmitted and delivered.

TELEGRAPH COMPANY MAY BY CONTRACT, BUT NOT BY MERE NOTICE, LIMIT ITS LIABILITY. — A telegraph company incorporated under the general statutes of New York may by contract limit its liability for mistakes or delays in the transmission or delivery, or for the non-delivery, of messages, caused by the negligence of its servants, if the negligence be not gross, to the amount received for sending the message; but it cannot so limit its liability by a mere notice, unless it is brought to the personal knowledge of the sender of the message and he is shown to have assented to it. In respect to the right of telegraph companies to limit their liability by notice, the same rule applies to them that applies to common carriers.

ACTION to recover damages alleged to have been caused by the defendant's failure to correctly transmit a telegraphic message. On the morning of July 31, 1884, the plaintiff, who was then a member of the firm of T. W. Pearsall & Co., bankers and brokers, wrote the following message on a blank sheet of paper, and delivered it to the defendant's operator at Great Neck, Long Island: —

"T. W. PEARSCALL & Co., Mills Building, New York City.

"Buy one thousand Western Union Telegraph.

"T. W. PEARSCALL."

The operator sent it addressed to "T. W. Pearsall, Mills Building, New York City." It was delivered in New York in a sealed envelope addressed "T. W. Pearsall," and as no one in the office had authority to open telegrams addressed to the plaintiff individually, it remained unopened until about ten o'clock next morning, when the plaintiff arrived at the office. The result was, that the shares ordered were not bought until August 1st, when the plaintiff had to pay for them seventeen hundred dollars more than they could have been bought for the day before. This action was brought to recover that sum. The substance of the conditions printed on form No. 2, referred to in the opinion, were, that the company would not be

liable for mistakes in the delivery of a message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same, unless the sender should order the message telegraphed back to the originating office for comparison, and for this service one half the regular rate was to be charged. The answer alleged that the plaintiff had notice of those terms and conditions. On the trial, however, he testified that he had no knowledge thereof, although he admitted that he was familiar with the general appearance of the defendant's blanks, and had frequently sent messages written on them. The jury returned a verdict for the plaintiff, upon which a judgment was entered, which was affirmed by the general term, and the defendant appealed.

Burton N. Harrison, for the appellant.

Thomas G. Shearman, for the respondent.

FOLLETT, C. J. This action was tried and a recovery had at circuit, which was sustained at the general term on the theory that the contract between the parties was the one implied by law when a telegraph company receives, without conditions, a message for transmission. Among other obligations implied in such a case is the duty to accurately transmit and deliver to the addressee the message received, which in this case defendant failed to do, as it admits, by reason of the mistake of the operator who received and undertook to send forward the communication. Under such a contract, a telegraph company does not insure the accurate transmission and delivery of a dispatch, but undertakes to exercise due diligence to do so.

The question has several times arisen whether, in actions for damages against such corporations for failing to accurately or promptly deliver communications, a plaintiff makes out a *prima facie* case by proving the contract and its breach, or whether the plaintiff must go further, and give evidence of some negligent act of omission or commission on the part of the corporation or of its agents.

Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263, 4 Am. Rep. 673, was brought to recover damages for failing to correctly transmit a message, and it was held that a *prima facie* case was made out by showing that the communication delivered was not a copy of the one sent.

In *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165, a dispatch was received for "Erie Darling," but as transmitted it was addressed to "E. R. Cooley," and was not

delivered to Darling for several days; and it was held that by proof of these facts a *prima facie* case was established.

In *Bress v. United States Tel. Co.*, 48 N. Y. 182, 8 Am. Rep. 526, it was proved that a message directing the purchase of seven hundred dollars in gold was changed to one ordering seven thousand dollars in gold, and it was said, though not necessary for the decision of the case, that it was not *prima facie* proof of negligence.

The rule laid down in the first two cases has been followed by the courts of other states, and is approved by the text-writers: Wharton on Negligence, sec. 756; Gray on Communication by Telegraph, secs. 28, 58, 54, 77; Abbott on Trial Evidence, c. 32; 2 Greenl. Ev., sec. 222a, note; 2 Shearman and Redfield on Negligence, sec. 542; 2 Thompson on Negligence, 837; 8 Sutherland on Damages, 295.

The court correctly instructed the jury that the evidence made out a *prima facie* case of negligence against the defendant.

In the cases holding that telegraph companies are only liable when grossly negligent, there were contracts exempting them from all liability, except to refund the tolls received for negligently sending or delivering the communication. Without considering whether there is any legal distinction to be drawn between gross and ordinary negligence in such cases, it is sufficient to say that these cases are not germane to the question in the case at bar.

At the time this message was received the plaintiff was one of defendant's share-holders, and it was offered to be proved, in defense of the action, that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeatd messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified; and it was insisted that he, being a share-holder, was chargeable with notice of this resolution. The regulations were excluded, and the defendant excepted. In this there was no error, for a share-holder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and the plaintiff's rights, arising out of defendant's contract to transmit the message, were in no wise limited by its regulations or by-laws not brought to the plaintiff's

knowledge: *Hill v. Manchester and Salford Water Works Co.*, 5 Barn. & Adol. 866; *Rice v. Peninsular Club*, 52 Mich. 87; Morawetz on Corporations, secs. 500, 500 a.

The court instructed the jury that the plaintiff was entitled to recover the difference between the market value of the stock on the morning of July 31st and the sum which he paid for it on the morning of the following day. It distinctly appeared on the face of the dispatch that it was an order to buy shares; and in such cases the liability of the corporation not being limited by a special contract, the measure of damages is the difference between the market value of the shares at the time when the dispatch should have been delivered, and the sum paid for them in the market on the receipt of the message: *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; 4 Am. Rep. 673; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 98 Am. Dec. 157; *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751; 3 Sutherland on Damages, 307.

It is insisted on behalf of the defendant that the court erred in excluding from the consideration of the jury the conditions printed on form No. 2. It is settled that a telegraph company incorporated under the general statutes of this state may by contract limit its liability for mistakes or delays in the transmission or delivery, or for the non-delivery, of messages, caused by the negligence of its servants, if the negligence be not gross, to the amount received for sending the dispatch: *Breese v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 236. But it has never been decided by the court of last resort that such a company can by notice limit its liability for such mistakes or delays.

Breese v. United States Tel. Co., 45 Barb. 274, 48 N. Y. 132, arose out of the erroneous transmission of a message written on a blank containing printed conditions, and it was held that a party by writing his dispatch on the blank assented to the printed terms and conditions. In discussing the question it was said: "They [telegraph companies] can thus limit their liability for mistake not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him." We think this remark cannot be regarded as an adjudication that the common-law liability of a

telegraph company may be limited by a mere notice, unless it is brought to the personal knowledge of the sender of the message and he is shown to have assented to it. In this state a common carrier may by an express contract with the shipper exempt itself from liability for loss or damage occasioned by the negligence of its servants: *Wells v. New York C. R. R. Co.*, 24 N. Y. 181; *Bissell v. New York C. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369; *Poucher v. New York Central R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364; *Cragin v. New York C. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559; *Spinetti v. Atlas S. S. Co.*, 80 N. Y. 71; 36 Am. Rep. 579; *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28; *Wheeler on Carriers*, 76, 86; But a common carrier cannot by notice limit its common-law liability to safely carry and deliver goods without evidence of the shipper's assent to the limitation proposed: *Hollister v. Nowlen*, 19 Wend. 284; 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470; *Clark v. Faxon*, 21 Wend. 153; *Camden etc. Trans. Co. v. Belknap*, 21 Wend. 354; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; 62 Am. Dec. 125; *Blossom v. Dodd*, 48 N. Y. 264; 8 Am. Rep. 701.

Telegraph companies organized, like the defendant, under chapter 265 of the Laws of 1848, and the acts amendatory thereof and supplementary thereto, like companies incorporated for the carriage of goods and passengers, owe duties to the public. Such corporations, like railroads, may exercise the right of eminent domain, and they are required to exercise due diligence to transmit, with celerity and skill, all messages delivered to them, subject to such reasonable rules as may be adopted to protect their rights and facilitate the performance of their duties. They, like common carriers, have become necessary instrumentalities for conducting the business of the country, and they owe the same duty to the public, and we think should be held to the same rule in respect to their right to limit their liability by notice. In this state the doctrine that the common-law liability could not be limited without an express contract has been applied to individuals and firms acting as common carriers, as well as to corporations.

In *MacAndrew v. Electric Tel. Co.*, 17 Com. B. 3, it was said that the common-law liability of a telegraph company may be limited by notice, but the report of the case does not show whether the message was written on a blank with or without conditions. But in England it was held that carriers could by notice limit their liability for the loss of goods, even in

cases of gross negligence, which resulted in statutes providing that their liability could not be limited except by an express contract: 11 Geo. IV., sec. 6, c. 68; 1 Wm. IV.; 17 & 18 Vict., sec. 7, c. 31.

In *Clement v. Western Union Tel. Co.*, 187 Mass. 463, a message, not written upon one of the defendant's blanks, was sent to its office for transmission. It was forwarded in due time, but was not delivered by the office at which it was received. In an action brought for the recovery of damages occasioned by the failure to deliver, it appeared that the plaintiff's agent who sent the message knew the terms and conditions on which the defendant by its rules provided that messages should be sent over its line as set forth in the blank then in use by it; and it was held that this knowledge of the plaintiff's agent was binding upon him, and that no recovery could be had.

In the case last cited, a different rule was applied to telegraph companies from the one applied by the same court to express companies. In *Gott v. Dinsmore*, 111 Mass. 45, the plaintiff shipped goods by express, not taking at the time the usual receipt containing printed conditions limiting the liability of the company, with which the plaintiff was familiar, he having been in its employment, and issued many such receipts. It was held that mere notice brought home to the owner of the goods, by which the carrier seeks to limit its common-law liability, and the terms of which are not expressly assented to, were insufficient to defeat a claim for loss. The court said: "Nor does the knowledge of the regulation which the plaintiff had previously acquired while in defendant's employment subject him to limitations imposed by the receipt." In *Ellis v. American Tel. Co.*, 13 Allen, 226, the reasons are clearly and satisfactorily stated for the existence of the rule that telegraph companies are not, unless they so expressly contract, held to warrant or insure the accurate transmission or prompt delivery of messages, and are only liable for negligence. But we find no satisfactory reason in this or in any case for a rule that such companies may by notice limit their liability for negligence, nor do we see any in the nature of the business in which they are engaged. Carriers and telegraph companies are alike engaged in *quasi* public employments, and persons are, from necessity, compelled to employ the latter without more opportunity for choice and deliberation than when they select the former. As before shown, the liability on contract of carriers of goods which is

implied by law cannot be limited by notice, and it is difficult to see why telegraph companies should be permitted to limit a much less onerous obligation by a mere notice.

The judgment should be affirmed, with costs.

BRADLEY and BROWN, JJ., delivered a dissenting opinion, of which the following is a synopsis: There was ample evidence in the case from which the jury could have found that the plaintiff knew of the regulations printed on form No. 2, and that all messages received and sent over the company's wires were subject thereto. If the jury had so found, it would have also been permissible for them to find that the message was sent subject to such conditions, and that the defendant's liability was limited to the amount charged for sending the message. A special and express contract is not necessary to limit the liability of the telegraph company for mistakes in the transmission of messages. In this respect such corporations differ from common carriers. The reason for this distinction is very clearly pointed out in *Ellis v. American Tel. Co.*, 18 Allen, 226. There is no conflict between *Clement v. Western Union Tel. Co.*, 137 Mass. 463, and *Gott v. Dinmore*, 111 Mass. 45, cited in the prevailing opinion.

It has been decided in this state that a telegraph company is not a common carrier, and is not subject to the peculiar liability of common carriers: *Breese v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526; *Schwartz v. Atlantic and P. Tel. Co.*, 18 Hun, 158; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231.

The authorities cited establish the rule that a telegraph company may limit its liability for mistakes in the transmission of messages by reasonable regulations brought to the knowledge of its customers, and had the jury found, as they might have done upon the evidence in this case, that the plaintiff knew that such regulations had been established, and that the defendant's liability was limited to the amount charged for sending the message, unless it was ordered to be telegraphed back, it would also have been permissible for them to find that he contracted with the defendant upon such condition.

It was material to a proper disposition of the case that the regulations printed upon the blank put in evidence should have been read to the jury, and it was error for the court to exclude them, and for such error the judgment should be reversed, and a new trial granted.

TELEGRAPH COMPANIES, DUTY OF, TO TRANSMIT AND DELIVER MESSAGES. — For a discussion of the rights, duties, and liabilities of telegraph companies generally, see extended note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 486-500. Telegraph companies are common carriers and public servants, and must therefore act whenever called upon, their charges being paid or tendered; they must transmit and deliver messages given to them for that purpose: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109. But see *Western Union Tel. Co. v. Mumford*, 87 Tenn. 190 10 Am. St. Rep. 630, and note.

TELEGRAPH COMPANIES — PROOF OF NEGLIGENCE. — As to pleading and evidence in actions against telegraph companies for negligence, see note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 499, 500. Proving the contract and showing its breach casts upon the telegraph company the burden of showing want of negligence on its part: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109.

TELEGRAPH COMPANIES — LIMITING LIABILITY FOR NEGLIGENCE. — As to whether or not a telegraph company may by contract limit its liability for negligence, see note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 491; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461; 15 Am. St. Rep. 917, and note; *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630, and note.

TELEGRAPH COMPANIES, MEASURE OF DAMAGES AGAINST, FOR LOSSES occasioned through neglect to transmit or promptly deliver messages: *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442; 15 Am. St. Rep. 687; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329; 15 Am. St. Rep. 835; *Alexander v. Western Union Tel. Co.*, 66 Miss. 161; 14 Am. St. Rep. 556, and note; note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 496-499.

TUCKER v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[124 NEW YORK, 508.]

DUTY OF TRAVELER ON HIGHWAY TO LOOK AND LISTEN FOR APPROACH OF

RAILWAY TRAINS. — The law requires a traveler, before crossing a railroad track on a public highway, to look and listen for the approach of trains, and if he omits to do so, and suffers injury while crossing, he cannot recover. In an action to recover damages for injuries so sustained, the plaintiff must show that he did his duty in this respect, or at least prove facts from which the inference can reasonably be drawn that he did. It will not be presumed that he looked; it must be proven. Evidence that a person, killed by a locomotive while crossing a track on a highway, turned his face towards the approaching engine when he was eleven feet from the track on which it was running, but passed on, without again turning his head in that direction, until he was struck, is not sufficient to justify the jury in finding that he did look, and thus observed that measure of care and caution which the situation imposed. But even if it could be inferred that he looked when at that point, to look then, and not again, and to go on from that point without observing the further precaution of watching for the approach of trains upon tracks almost constantly in use, was not a proper observance of that care which it was his duty to exercise.

INFANT, WHEN SUI JURIS SO AS TO BE CHARGEABLE WITH NEGLIGENCE.

— In the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*, and chargeable with the same degree of caution that an adult would be.

ACTION to recover damages for the alleged negligent killing of the plaintiff's intestate. The deceased was about the center of the track when he was struck by a locomotive backing at a high rate of speed, and killed. The other facts appear from the opinion.

James Fraser Gluck, for the appellant.

Henry W. Hill, for the respondent.

PARKER, J. Whether the complaint should have been dismissed after the evidence was all in, on the ground that the negligence of the plaintiff's intestate contributed to the accident, presents the only question which we shall discuss on this review.

In its disposition we shall consider, first, whether, assuming the intestate to have been *sui juris*, the evidence adduced authorized the jury to find that plaintiff's intestate was free from contributory negligence; if not, whether the fact that the intestate was only a little over twelve years of age, considered in connection with the other circumstances proven, could be permitted to effect a different result.

The plaintiff, in order to recover for the damages sustained by the killing of his intestate, which was occasioned by his being run over and killed by a locomotive on the defendant's road while crossing its tracks on Smith Street, in the city of Buffalo, was burdened with the necessity of proving, — 1. That the defendant was guilty of negligence; and 2. That he was free from all fault contributing to that result.

The law requires a traveler, before crossing a railroad track on a public highway, to look and listen for the approach of trains. If he omit to do so, and suffers injury while crossing, he cannot recover because of such omission. That which it is his duty to do, he, or in the case of death his representative, must, in an action to recover for damages sustained, prove was done, or at least must prove facts from which inference can reasonably be drawn that he performed his duty in that respect. It will not be presumed that he looked; it must be proven. The plaintiff attempted to meet this requirement by the evidence of a witness who testified that before the intestate crossed the track, in the doing of which he was struck by the locomotive and killed, he stopped in the center of the switch-track, eleven feet from the north rail of the track upon which the locomotive was running, and shifted the bag which he was carrying from one shoulder to the other, resting it upon the bumper of a car standing on the track as he did so, and that at this time his face was turned in the direction of the approaching engine. He then passed on in a southerly direction for the distance of about fourteen feet, when he was struck. The witness further testified that after changing the bag from one

shoulder to the other, he did not again turn his head to the left, as it would have been necessary for him to do in order to to see the approaching locomotive. It is urged that inasmuch as it appears that his face was turned in the direction from whence the locomotive came, that a jury could be permitted to find that he did look and thus observe that measure of care and caution which the situation imposed. We are unable to agree with that contention; for it appears that from the place where he was standing it was possible to see along the track a distance of 186 feet; that when he reached the south rail of the switch-track, a distance of eight feet and five inches from the north rail of the track upon which the locomotive was running, he could see for two streets away, and that before reaching such rail the view was unobstructed for nearly a mile. It seems to be clear, therefore, that the plaintiff did not meet the burden resting upon him by merely showing that his face was turned in that direction; for if he had looked he must have seen this engine approaching. But if the inference was permissible that he looked at the moment of changing the bag, it does not meet the requirements of the case. He had still six tracks to cross, and was then eleven feet from the south rail of the first track. To look then, and not again, to go on from that point without observing the further precaution of watching for the approach of trains upon tracks almost constantly in use, was not a proper observance of that care which it was his duty to exercise: *Cullen v. Delaware & H. C. Co.*, 113 N. Y. 668; *Cordell v. New York Central & H. R. R. Co.*, 70 N. Y. 119; 26 Am. Rep. 550; *Woodard v. New York etc. R. R. Co.*, 106 N. Y. 369; *Young v. New York etc. R. R. Co.*, 107 N. Y. 500.

And this the plaintiff's intestate did, according to the evidence of the witness Martin, who was called by the plaintiff to prove that at the moment of shifting the bag Tucker was facing in the direction of the approaching locomotive. Indeed, it must have been so, for had he looked at any moment before reaching the track, he would have observed its coming.

It appears that the wind was blowing severely and snow was falling rapidly, and it is suggested that by reason thereof he may have been prevented from seeing the approaching locomotive; but the evidence introduced on the part of the plaintiff shows that such was not the fact. There were two little girls on the cars at the crossing at the point where the boy stood when shifting the bag from one shoulder to the other, and they saw the locomotive coming. Frank Surnes

was on Smith Street, near the place of the accident, at the time of its occurrence, and he testified that he saw it approaching when it was at Onida Street. The witness Martin also saw it when 350 feet distant. No witness pretends that it could not be seen, and no room exists for the inference that the plaintiff's intestate could not have seen it had he looked.

We are thus led to the conclusion that there was no evidence authorizing the jury to find that the plaintiff observed that degree of care and caution which the law imposes on one while in the act of crossing railroad tracks on a public street. If he had been an adult, therefore, it would have been the duty of the court to have dismissed the complaint. Does a different rule apply because the intestate was a boy only a little over twelve years of age? An infant of tender years is not expected to exercise the same care and caution which is required of a person of more advanced age, so that it frequently becomes a question for the jury, under proper instructions by the court, whether a child exercised that measure of care and caution which should be required and expected from it.

In the case of *McGovern v. New York Central & H. R. R. Co.*, 67 N. Y. 417, a boy eight years of age, while crossing a railroad track, was struck by a backing engine, and killed. In that case this court held that it was a question for the jury to determine whether he exercised that degree of care and circumspection which a child of his years and maturity of judgment would be expected to exercise.

In the case of *Wendell v. New York Central & H. R. R. Co.*, 91 N. Y. 420, the plaintiff's intestate, a boy of seven years of age, was held to have been guilty of culpable negligence, it appearing that he was a bright, active boy, capable of understanding the peril of the situation which he recklessly encountered, resulting in his death.

In *Stone v. Dry Dock etc. R. R. Co.*, 115 N. Y. 104, the plaintiff's intestate, a child of seven years, was run over by a street-car, and in that case it was held that he could not be deemed, as a matter of law, to be *sui juris* so as to be chargeable with negligence, but that it presented a question for the jury.

In *Reynolds v. New York Central & H. R. R. Co.*, 58 N. Y. 248, a bright and intelligent boy thirteen years of age was killed while crossing a railroad track. The summer before, he had worked on a farm, and received thirteen dollars a month and board for his services, but at the time of the accident he was living at home, attending school. The plaintiff

liable for mistakes in the delivery of a message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same, unless the sender should order the message telegraphed back to the originating office for comparison, and for this service one half the regular rate was to be charged. The answer alleged that the plaintiff had notice of those terms and conditions. On the trial, however, he testified that he had no knowledge thereof, although he admitted that he was familiar with the general appearance of the defendant's blanks, and had frequently sent messages written on them. The jury returned a verdict for the plaintiff, upon which a judgment was entered, which was affirmed by the general term, and the defendant appealed.

Burton N. Harrison, for the appellant.

Thomas G. Shearman, for the respondent.

FOLLETT, C. J. This action was tried and a recovery had at circuit, which was sustained at the general term on the theory that the contract between the parties was the one implied by law when a telegraph company receives, without conditions, a message for transmission. Among other obligations implied in such a case is the duty to accurately transmit and deliver to the addressee the message received, which in this case defendant failed to do, as it admits, by reason of the mistake of the operator who received and undertook to send forward the communication. Under such a contract, a telegraph company does not insure the accurate transmission and delivery of a dispatch, but undertakes to exercise due diligence to do so.

The question has several times arisen whether, in actions for damages against such corporations for failing to accurately or promptly deliver communications, a plaintiff makes out a *prima facie* case by proving the contract and its breach, or whether the plaintiff must go further, and give evidence of some negligent act of omission or commission on the part of the corporation or of its agents.

Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263, 4 Am. Rep. 673, was brought to recover damages for failing to correctly transmit a message, and it was held that a *prima facie* case was made out by showing that the communication delivered was not a copy of the one sent.

In *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165, a dispatch was received for "Erie Darling," but as transmitted it was addressed to "E. R. Cooley," and was not

delivered to Darling for several days; and it was held that by proof of these facts a *prima facie* case was established.

In *Breece v. United States Tel. Co.*, 48 N. Y. 182, 8 Am. Rep. 526, it was proved that a message directing the purchase of seven hundred dollars in gold was changed to one ordering seven thousand dollars in gold, and it was said, though not necessary for the decision of the case, that it was not *prima facie* proof of negligence.

The rule laid down in the first two cases has been followed by the courts of other states, and is approved by the text-writers: Wharton on Negligence, sec. 756; Gray on Communication by Telegraph, secs. 28, 53, 54, 77; Abbott on Trial Evidence, c. 32; 2 Greenl. Ev., sec. 222a, note; 2 Shearman and Redfield on Negligence, sec. 542; 2 Thompson on Negligence, 837; 8 Sutherland on Damages, 295.

The court correctly instructed the jury that the evidence made out a *prima facie* case of negligence against the defendant.

In the cases holding that telegraph companies are only liable when grossly negligent, there were contracts exempting them from all liability, except to refund the tolls received for negligently sending or delivering the communication. Without considering whether there is any legal distinction to be drawn between gross and ordinary negligence in such cases, it is sufficient to say that these cases are not germane to the question in the case at bar.

At the time this message was received the plaintiff was one of defendant's share-holders, and it was offered to be proved, in defense of the action, that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeatd messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified; and it was insisted that he, being a share-holder, was chargeable with notice of this resolution. The regulations were excluded, and the defendant excepted. In this there was no error, for a share-holder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and the plaintiff's rights, arising out of defendant's contract to transmit the message, were in no wise limited by its regulations or by-laws not brought to the plaintiff's

SIMMONS v. EVERSON.

[124 NEW YORK, 312.]

PARTIES MAINTAINING NUISANCE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES RESULTING THEREFROM WHEN. — Persons who by their several acts or omissions maintain a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it. Where, therefore, three several owners of adjoining lots on a city street permit a brick wall extending along the fronts of their several lots to remain in a leaning, unsafe, and dangerous condition, after the buildings of which they were a part had been burned down, and such wall falls upon and kills a person who was lawfully standing on the sidewalk adjacent thereto, all of said owners are jointly and severally liable, although no part of the wall of one of them touched him.

ACTION to recover damages for the death of plaintiff's intestate, alleged to have been caused by the defendants' negligence. The trial court found that the appellants owned in severalty three adjoining lots on a street in the city of Syracuse. A continuous brick wall formed the front of the three buildings on these lots. These buildings were destroyed by fire, which left standing only the front wall and parts of the partition walls. Shortly after the fire, this front wall began to lean toward the street, and began to incline more and more, until November 17, 1887, when it gave way and fell. Material from the part of it which stood on the lots of appellants Everson and Pierce fell upon and killed the plaintiff's intestate, who was lawfully on the sidewalk near the boundary between their properties. No part of the wall of appellant Lynch fell on decedent. It was found that each of the defendants was careless and negligent in not removing or supporting the walls on his own lot, and that the several neglects of the defendants united and directly caused the walls to fall. It was also found that these walls were so unsafe that they were a public nuisance, and that the decedent did not negligently contribute to the accident.

M. M. Waters, for appellant Everson.

Smith, Kellogg, and Wells, for appellant Pierce.

Hiscock, Doheny, and Hiscock, for appellant Lynch.

William Nottingham, for the respondents.

FOLLETT, C. J. It is urged, in behalf of the defendants, that at most this is but a case of several independent acts of negligence committed by each, the joint effect of which caused

the accident, and for which they are not jointly liable within the rule laid down in *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566.

The case at bar does not belong to the class of actions arising out of acts or omissions which are simply negligent; and while the defendants did not intend by their several acts to commit the injury, their conduct created a public nuisance which is an indictable misdemeanor under the statutes of this state: Pen. Code, secs. 385, 387; *Vineett v. Cook*, 4 Hun, 318; and at common law: *Regina v. Watts*, 1 Balk. 357; 2 Ld. Raym. 856; 1 Russell on Crimes, 5th ed., 423; 2 Wharton's Crim. Law, sec. 1410; Bigelow on Torts, 237; Pollock on Torts, 2d ed., 345; Stephen's Digest of Criminal Law, art. 176; Indian P. C., sec. 268.

Persons who by their several acts or omissions maintain a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it: *Irvine v. Wood*, 51 N. Y. 224, 230; 10 Am. Rep. 603; *Slater v. Mersereau*, 64 N. Y. 183; *Timlin v. Standard Oil Co.*, 54 Hun, 44; *Klauder v. McGrath*, 35 Pa. St. 128; 78 Am. Dec. 329; 1 Shearman and Redfield on Negligence, 4th ed., sec. 122; Pollock on Torts, 2d ed., 356.

The fall of these four-story brick walls into the street was the direct and immediate consequences of the several acts of the defendants in suffering the portions standing on their own lots to remain unsupported after they had visibly begun to incline towards the street, and it was as obvious before as it was after the accident that if any part of the front wall fell, a large part of it must, and that it would go into the street.

The judgment should be affirmed, with costs.

NUISANCES—LIABILITY OF PERSONS MAINTAINING A NUISANCE.—The liability of several persons for creating or continuing a nuisance is both several and joint, and the plaintiff may, at his pleasure, sue one or all of the wrong-doers: Note to *Creed v. Hartman*, 86 Am. Dec. 347, 348. But compare *Blaisdell v. Stephens*, 14 Nev. 17; 33 Am. Rep. 623, and notes; *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566.

MANDEVILLE v. AVERY.

[124 NEW YORK, 376.]

CHATTEL MORTGAGE WITHOUT IMMEDIATE DELIVERY OR CHANGE OF POSSESSION VOID AS AGAINST CREDITORS WHEN. — A chattel mortgage which is not accompanied by an immediate delivery or followed by an actual or continued change of possession of the chattels mortgaged, and which is executed upon an agreement that the mortgagor may remain in possession of the property covered by the mortgage, and sell the same at retail, and use the avails in substantially the same manner as before the execution of the mortgage, is void as against the creditors of the mortgagor. And the term "creditors" includes all persons who were such while the chattels remained in the possession of the mortgagor under that agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee.

RIGHT OF CREDITOR TO ATTACK CHATTEL MORTGAGE AS FRAUDULENT NOT WAIVED WHEN. — An assent by a creditor to an arrangement between a mortgagor and mortgagee which will preclude him from asserting his rights as a creditor against the property mortgaged must be such as to create against him an equitable estoppel, or it must exist in agreement supported by a valid consideration. An alleged assent made upon condition that the mortgagor should return to the creditor a portion of the goods purchased of him, the purchase price for which constituted the indebtedness, and would make payments to him, neither of which conditions were complied with, is without consideration, and therefore not binding.

CREDITOR NOT DEPRIVED OF RIGHT TO ATTACK CHATTEL MORTGAGE BY AGREEMENT MADE BY HIS AGENT WHEN. — A creditor cannot be deprived of his legal right to attack a chattel mortgage as fraudulent, by an agreement made by his agent waiving such right, without evidence that he knew of the defect in the mortgage, and had authorized his agent to make an agreement in reference thereto, or had acquiesced in such an agreement when made.

RECEIVER APPOINTED IN SUPPLEMENTARY PROCEEDINGS, POWERS AND RIGHTS OF. — A receiver appointed in supplementary proceedings under the code is vested with the legal title to all the personal property of the judgment debtor, and has the right to prosecute all actions to set aside all transfers of property made by the debtor to defraud his creditors. For the purpose of maintaining such actions he represents the creditors, and possesses the same rights as the creditor under whose judgment he was appointed would himself have had.

MORTGAGEE CANNOT RETAIN PROPERTY OR ITS PROCEEDS OBTAINED UNDER FRAUDULENT MORTGAGE. — Although a mortgagee may have an honest claim, he cannot, as against a pursuing creditor, retain property obtained by him under his mortgage if it be fraudulent; and if he takes and sells the property by virtue of his mortgage before any lien thereon is acquired by a creditor, the latter may compel him to refund the proceeds; for the mortgage being void, all proceedings under it are also void. The right of the creditor cannot be defeated by a fraudulent mortgagee by merely selling the mortgaged property.

PLEA OF FORMER ACTION PENDING, WHAT NECESSARY TO SUSTAIN. — To sustain a plea of former action pending, it must appear from the pleadings in the first action that it was for the same cause as the second, or necessarily involved the same question. It is not enough that the same property is in controversy in both actions.

ACTION brought to have two chattel mortgages, executed by defendant Henry J. Beck to defendant Edward H. Avery and the National Bank of Auburn, adjudged fraudulent and void, and to require defendant Avery to account for the proceeds of the sale of the mortgaged property, and pay over to the plaintiff such part of said proceeds as was necessary to satisfy the judgment of Lewis P. Ross, a creditor of said Beck. The facts are stated in the opinion.

David Hays, for the appellant.

J. C. Avery, for the respondent.

BROWN, J. The mortgage to the National Bank of Auburn, which was subsequently assigned to Mr. Avery, was executed January 24, 1887. The mortgage to Avery was executed February 8, 1887. As to the first mortgage, the court found that it was not accompanied by an immediate delivery or followed by an actual or continued change of possession of the chattels mortgaged, and that it was executed upon an agreement with the bank that the mortgagor might remain in possession of the property covered by the mortgage, and sell the same at retail in substantially the same manner as before the execution of the mortgage, and use the avails.

Similar findings as to the Avery mortgage were refused. The court found, as a conclusion of law, that the mortgage to Avery was valid, and that the mortgage to the bank was not fraudulent and void as against the judgment of said Ross nor the plaintiff in this action.

There was ample evidence to support the findings aforesaid, and the validity of the Avery mortgage cannot be questioned on this appeal.

The finding quoted in reference to the mortgage to the bank rendered it void as to the creditors of the mortgagee; *Gardner v. McEwen*, 19 N. Y. 123; *Russell v. Winne*, 37 N. Y. 591; 97 Am. Dec. 755; *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168; *Brackett v. Harvey*, 25 Hun, 502; *Bainbridge v. Richmond*, 47 Hun, 391. And the term "creditors" includes all persons who were such while the chattels remained in possession of the mortgagor under that agreement, and it was not

essential to their rights that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee: *Stimson v. Wrigley*, 86 N. Y. 332; *Dutcher v. Swartwood*, 15 Hun, 31.

The conclusion that this mortgage was not void as against the judgment of Ross or the plaintiff was based upon a finding that Ross, the judgment creditor, with full knowledge that the agreement in reference to the possession of the mortgaged property had been entered into, assented to such arrangement.

This finding is challenged by the appellant, on the ground that there is no evidence tending to support it; and whether there is, or not, is the vital question in the case.

We are of the opinion that this finding cannot be sustained.

An assent by a creditor to an arrangement between the mortgagor and mortgagee which would preclude him from asserting his rights as a creditor of the mortgagor against the mortgaged property must be such as to create against him an equitable estoppel, or it must exist in agreement, and in such case must be supported by a valid consideration.

It could not be claimed in this case that there was an estoppel. The mortgage was executed and delivered, and the illegal agreement made, before Ross or his agent knew of it, and there is no evidence and no claim that Mr. Avery did any act to his own prejudice, or adopted any line of conduct by reason of anything said or done by Ross or on his behalf.

Nor was there any valid agreement. Without stating in detail the evidence, it appears that Beck, when he applied to Ross to sell him goods, informed him that Mr. Avery, who was president of the bank, was to loan him one thousand dollars to be used in his business, without security. Ross inquired of Avery by letter if that statement was true, and Avery replied that he had agreed to help him to the extent of one thousand dollars.

Ross understood this as an affirmative answer to his question, and made the sale. Soon after the mortgage was given, Ross learned of it, and sent his agent, Gordon, to Auburn to inquire about it. He called on Avery and asked him why he took the mortgage after it was understood that the loan was to be without security. Avery told him that Beck had offered to give it, as he had used some of the money loaned him in paying encumbrances on his property, and that the bank would let him go on as if no mortgage had been made.

Gordon replied that if Beck would continue in business and pay Ross a little now and then he would be satisfied, and that Beck had some of the goods which Ross had sold him, which were out of season, and if he would return them he would have credit. Avery said that any arrangement that Gordon made with Beck about payment or return of the goods would be satisfactory to him.

This conversation took place on February 3d, and on February 8th Beck gave Avery another mortgage, whereupon he immediately took possession of the stock in the store, and proceeded to sell it out under both mortgages.

There is no evidence in the case that Gordon had any authority from Ross to make an agreement to waive or surrender his right to attack the mortgage as fraudulent, or that the fact of such an agreement ever was communicated to him, or that he acquiesced therein if it was told to him, and none that he ever knew, prior to the commencement of this suit, of the agreement between the mortgagor and mortgagee which rendered the mortgage void.

I think a creditor could not be deprived of his legal rights as a result of an agreement made with his agent without some evidence that he knew of the defect in the mortgage, and had authorized his agent to make an agreement in reference thereto, or had acquiesced in it when made, and this case is barren of any evidence tending to show any of these facts.

But it is not necessary to rest our decision on that ground.

Assuming Gordon to have had full authority to negotiate with Avery and make the arrangement testified to, there was no consideration for the agreement.

The only consideration claimed is in the implied promise of Avery to release from the lien of his mortgage the goods that Beck should return to Ross, and the payments that he would make to him, presumably out of the proceeds of sales at the store.

But no payments were ever made and no goods were returned, and the mere promise to release in case Beck returned the goods did not constitute a consideration. It was conditioned solely upon Beck's action, and could become operative and binding only in case the goods were returned and payments made. It would be a remarkable proposition that Ross could be held to his contract in consideration of the return of goods never delivered to him and payments on account of his claim never made. The agreement, if it may

be called such, was conditioned solely upon acts of Beck which were never performed.

Moreover, it does not appear that Gordon expressed himself as satisfied that the bank should hold the mortgage, but with the statement of Avery that the bank would let Beck go on with the business. Avery testified that he told Gordon that it was his desire that he (Beck) should continue, and he saw no reason why he should not; that there was no disposition by the bank to injure him or press him, and that he hoped he would go on and continue in business and pay his liabilities; that it was for the interest of all parties that he should go on and finish his work and make it valuable, and that Gordon said "that would be satisfactory to him." If this was evidence of a contract, it certainly meant that Avery would not enforce the mortgage, and assuming that Gordon knew that the agreement between the bank and Beck rendered that instrument void as to creditors, he might very well have expressed his satisfaction with the situation. Both parties were thus left in their original situation with reference to each other. Neither had preference over the other, and both relied upon the business to repay their debts, and this is all that, in my judgment, can fairly be inferred from the testimony.

The judgment must therefore be reversed, unless the other points made by the respondent can be sustained.

It is claimed that the plaintiff as receiver cannot maintain this action.

A receiver appointed in supplementary proceedings under the code is vested with the legal title to all the personal property of the judgment debtor, and has the further right to prosecute actions to set aside all transfers of property made by the debtor to defraud his creditors.

For the purpose of maintaining such actions he represents the creditors, and possesses the same rights as the creditor under whose judgment he was appointed would himself have had: *Becker v. Torrance*, 31 N. Y. 631; *Bostwick v. Menck*, 40 N. Y. 383; *Wright v. Nostrand*, 94 N. Y. 31. And his rights in this respect were not confined to the assigned property, but he could follow the fund or proceeds of the sale thereof into the possession of any person not a *bona fide* owner or holder thereof.

If the creditor could have secured a levy by execution upon the mortgaged property before a sale thereof, the fraudulent mortgagee could not have held the property against the sher-

iff: *Brewing Co. v. Hart*, 48 Hun, 393; *Sperry v. Baldwin*, 46 Hun, 120; *Stimson v. Wrigley*, 86 N. Y. 332.

The right to collect the debt out of the mortgaged property could not be defeated by the mortgagee simply by selling the property.

The same right that existed against the property would exist in favor of the creditor against the proceeds of the sale in the possession of the mortgagee, and an action to reach such a fund would be maintainable either by the creditor or by a receiver appointed in supplementary proceedings under the judgment. To hold otherwise would be to decide that the beneficial provisions of the statute could be defeated by a fraudulent mortgagee or vendee by merely selling the assigned property, and as this could, in the great majority of cases, be done before a judgment could be obtained by the creditor, and a levy made, the statute would be practically annulled: *Dutcher v. Swartwood*, 15 Hun, 31.

The general term, however, based its decision upon the ground that the debt to the bank having been a valid one, and having been paid out of the mortgaged property before any lien was obtained thereon, another creditor could not compel the mortgagee to refund the money on the ground that as against creditors generally the mortgage given to secure the paid debt would have been adjudged void.

Two classes of cases are cited by that learned court to sustain this conclusion: 1. Those holding that an assignee acting under a void assignment will not be held accountable for such of the proceeds of the assigned property paid out by him to creditors in pursuance of the assignment before any other creditor has obtained a lien upon the assigned property; 2. That the objection that a chattel mortgage is void is not available, when, before any creditor had questioned its validity, the mortgagor delivered the chattels to the mortgagee, and authorized an immediate sale thereof by him.

I am unable to see that the first class of cases has any application to the facts before us.

As to the second, there is no doubt as to the right of a debtor to prefer any creditor, and to pay his debt in full, either in money or property, to the exclusion of all others.

But to apply that principle to this case is to ignore completely the facts pleaded and found by the court. There was no claim that the property sold was turned over by Beck to Avery in payment of the debt. The complaint alleged that

the property was sold by Avery under the mortgage, and this fact was not denied by the answer. The court also found that Avery, by virtue of both mortgages, took possession of the mortgaged property, and as such mortgagee caused the same to be advertised at public sale and sold under said mortgages.

There is nowhere any suggestion in the evidence or findings that the mortgage was waived or abandoned, or that the debtor had voluntarily delivered the property to Avery with authority to sell it.

Everything that was done was pursuant to and under the mortgages. Avery could not and did not claim to have received the property or the proceeds of the sale in payment of his debt as the voluntary act of the debtor, but as mortgagee.

He cannot therefore assert against the claim of other creditors the honesty of his own debt. The mortgage being void, all proceedings under it were void, and although he may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor. The proceedings taken to collect the debt are unlawful: *Murtha v. Curley*, 90 N. Y. 372; *Billings v. Russell*, 101 N. Y. 226-231; *Wells v. Langbein*, 20 Fed. Rep. 188. It is further claimed that the judgment in the case of *Avery v. Mead* was a bar to this action. That was an action brought by defendant to recover possession of the mortgaged property from the sheriff, who had levied upon it under an attachment issued in favor of Ross and against Beck.

It appeared upon the trial that the judgment in that action, which was set out in the answer, and which adjudged Mr. Avery to be the owner and entitled to the possession of the mortgaged property, had been reversed, and a new trial granted, but the court found as a fact that the action was still pending.

We may therefore treat the defense as a plea of a former action pending. To sustain such a plea, it must appear from the pleadings in the first action that it was for the same cause as the second, or involved necessarily the same question. It is not enough that the same property is in controversy in both actions: *Dawley v. Brown*, 79 N. Y. 390.

The complaint in *Avery v. Mead* alleged that on February 16, 1887, the plaintiff was lawfully possessed of the property therein described, which was the mortgaged property, and

that the defendant wrongfully took said property from the plaintiff.

The defendant justified under an attachment issued in the suit of *Ross v. Beck*, and alleged that the goods levied upon by him were the property of Beck, and "that any pretended transfer of said goods to the plaintiff was in fraud of creditors, and void."

We need not speculate what result might follow the trial of that action. It is plain that, to succeed in his defense, the sheriff would necessarily be compelled to establish the invalidity of both of the mortgages held by Mr. Avery.

But it was not essential to Avery's success that he should establish the validity of both.

The right to the possession of the mortgaged property could have been successfully asserted under the second mortgage, and the validity of the mortgage to the bank did not therefore necessarily come in issue.

Avery might have recovered possession of the mortgaged property in the action against the sheriff, and not be able to sustain the validity of the bank mortgage.

In other words, the validity of the bank mortgage, which is the sole inquiry here, was not necessarily involved in the action against the sheriff.

Hence the pendency of that action was not a defense to this.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CHattel Mortgages — WANT OF A CHANGE OF POSSESSION, EFFECT OF. — The question of the effect of a chattel mortgage allowing the mortgagor the right to retain possession of the mortgaged property and sell the same, where the rights of creditors are involved, is discussed in *Peabody v. Landon*, 61 Vt. 310; 15 Am. St. Rep. 903, and particularly extended note 912-917. Possession of merchandise mortgaged by the mortgagor, with power retained in him to sell the same in the usual course of business, renders the mortgage void as to the attaching creditors of the mortgagor, in the absence of a provision requiring him to apply the profits to the mortgagee's debt: *Huschie v. Morris*, 181 Ill. 587; but with such a provision, the mortgage is not rendered fraudulent: *per se: Sims v. Hodge*, 121 N. Y. 671.

DURANT v. PIERSON.

[124 NEW YORK, 444.]

PARTNERSHIP. — DEATH OF PARTNER PUTS AN END TO THE COPARTNERSHIP, and the surviving partner has no authority to carry on for the future a partnership trade or business, or to engage in new transactions, contracts, or liabilities on account thereof.

PARTNERSHIP. — SURVIVING PARTNER IS ENTITLED to the possession and control of the joint property for the purpose of closing its business, and to that end may administer the affairs of the firm, and by sale, mortgage, or other reasonable disposition of the property make provision for meeting its obligations. He may, for that purpose, borrow money, and give a valid pledge of copartnership property for its repayment.

SURVIVING PARTNER'S POWER TO BORROW MONEY TO PAY DEBTS OF COPARTNERSHIP. — A surviving partner may in good faith borrow money for the express purpose of paying the debts of his firm, and where a person in good faith loans money to a surviving partner, and the money is faithfully applied by such partner in satisfaction of the liabilities of the firm, the claim becomes one which in equity should be paid out of the assets of the firm, and equity will recognize the right of the surviving partner to have the money so borrowed and applied by him repaid out of the assets of the firm, and an assignment by him for the benefit of creditors which so directs is not fraudulent.

ACTION to set aside an assignment. The opinion states the case.

Marcus T. Hun, for appellants Pruyn and Pierson.

Abraham Lansing, for the National Commercial Bank of Albany, appellant.

George L. Stedman, for the respondent.

HAIGHT, J. This action was brought to set aside an assignment made by the defendant Henry R. Pierson, as survivor of the late firm of Henry R. Pierson and Son, to the defendant Robert C. Pruyn, for the benefit of creditors, upon the ground that it was fraudulent and void as against the creditors of the firm, for the reason that it directed the payment to the National Commercial Bank of the sum of fifteen thousand dollars.

The referee has found as facts that Henry R. Pierson, the elder, died on the first day of January, 1890, leaving the defendant Henry R. Pierson, his son, as the sole surviving member of the firm; that the firm kept an account with the National Commercial Bank of Albany in the name of Henry R. Pierson and Son, which was open and unsettled upon the books of the bank on the ninth day of January, 1890, at which time the defendant Pierson made application to the

bank for the loan of \$15,000; that upon making such loan there was credited upon the books of the bank to the firm the sum so loaned, and a note was given therefor, payable on demand, signed in the name of the firm by Henry R. Pierson, survivor; that \$10,150 thereof was subsequently drawn out of the bank by the checks of the defendant Henry R. Pierson, signed by him as survivor, and the same was applied and used in the payment of the debts of the firm. The referee further found as facts that the purpose of said defendant Henry R. Pierson in applying for and obtaining such loan was to procure money with which to pay the obligations of the firm which had matured or were about to mature, and that the bank understood such to be the purpose of the loan at the time of making the same; that the firm was in fact insolvent on the first day of January, 1890, at the time of the decease of the elder Pierson, but that such fact was not known to either the defendant Pierson or the National Commercial Bank at the time the loan was made. He further found as a fact that in inserting in the assignment the direction to pay the National Commercial Bank of Albany from the firm property the amount of the note, the defendant Pierson acted with intent to hinder, delay, and defraud the creditors of the firm, but that at the time of making such assignment the defendant Pierson believed that such note was a firm obligation, or an obligation which was legally enforceable against the property and assets of the firm, and that he therefore was not morally chargeable with wrong in directing its payment out of the property of the firm; that the appropriation by him of the money borrowed of the bank to the payment of the firm debts created a claim in his favor against the estate which before the assignment could have been properly paid out of the firm's assets. As a conclusion of law, he found that the debt created by the loan by the National Commercial Bank was the individual debt of the defendant Pierson, and not that of the firm; that the assignment was consequently fraudulent as to the plaintiff, and directed judgment accordingly.

If the debt created by the loan be the individual liability of the survivor, and one that the firm ought not to pay, and the firm be insolvent, the survivor had no right in his assignment to direct its payment out of the firm's assets, and by so doing the assignment was rendered fraudulent as to the creditors of the firm: *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v.*

Whitwell, 52 N. Y. 146; 11 Am. Rep. 683; *Second Nat. Bank of Onwego v. Burt*, 96 N. Y. 233-245; *Bulger v. Rosa*, 119 N. Y. 459-465.

It thus becomes important to determine whether the loan contracted by the survivor became a firm obligation for the payment of which its assets may justly be applied. As we have seen, the note given upon procuring such loan bore the name of the firm and that of Henry R. Pierson as survivor, but at the time that this note was given it was known to all of the parties concerned that the senior member of the firm had died.

The death of a partner puts an end to the copartnership, and there is no longer any power or authority of the surviving partners to carry on for the future a partnership trade or business, or to engage in new transactions, contracts, or liabilities on account thereof: *Story on Partnership*, secs. 342, 343; *Hall v. Lanning*, 91 U. S. 160-170; *Farr v. Morrill*, 53 Hun, 31-35.

It is thus apparent that whilst the note in form would appear to create an obligation of the firm, it is at law unavailable as such, for the reason that there was no power in the survivor to make it. But it does not follow but that it is a claim which ought, in justice and equity, to be paid out of the firm's assets. If it is, the preference in the assignment would not be void, for the law will not declare fraudulent that which equity adjudges right and proper: *Denton v. Morrill*, 43 Hun, 224-229.

We must therefore consider whether there are equities which will support the claim of the bank to be paid out of such assets. It is apparent that the money borrowed from the bank by the survivor was for the purpose of paying the creditors of the firm the claims then matured and pressing. The amount of the loan was credited upon the open account of the firm with the bank, and subsequently ten thousand dollars thereof, or thereabouts, were drawn out by the survivor upon his check, and used in the payment of the liabilities of the firm. At the time this loan was made, it was not supposed by the officers of the bank, or the surviving partner, that the firm was insolvent, and no question is made but that both parties acted in good faith. The question is therefore presented whether a surviving partner may in good faith borrow money for the express purpose of paying the debts of his firm, and by so applying the money borrowed create an equity for the

satisfaction of which the assets of the firm may properly be devoted. As we have seen, the survivor became entitled to the assets, which he had the right to sell, mortgage, and dispose of, in order to pay the debts and close up the affairs of the copartnership. If he had the power to sell or mortgage, it would seem to follow that he had the power to borrow and pledge the assets for the repayment of the loan, and the amount borrowed having been faithfully applied in liquidation of the debts of the copartnership, equity will recognize the justness of the claim of the party making the loan. Cases may arise where the exercise of such authority may be highly expedient, if not necessary, for the preservation of the rights of creditors and persons interested in the distribution of the assets of the firm; as, for instance, creditors may by levy expose the assets to a forced public sale under circumstances which would work great sacrifice to the estate. In case a survivor should be insolvent, he might be able to raise money by a pledge to repay out of the partnership assets when he could not obtain it upon his own credit. We do not see that harm could result to the other creditors by permitting this to be done; for it would not increase the obligations of the firm nor lessen their share in the distribution of the assets in case the firm be insolvent. It is not questioned but that the survivor had the right to turn out as a security or pledge the assets of the firm in payment for the money received by him. He could have sold the assets and repaid the money loaned at any time before executing the assignment, and without taint of fraud. It is not apparent how the rights of the parties are changed and the act of the survivor made fraudulent by doing that in the assignment which he had the right to do immediately before executing it.

The precise question involved in this case does not appear to have been passed upon in any reported case, so far as we have been able to discover, except in *Haynes v. Brooks*, 8 Civ. Proc. Rep. 106-113, where an assignment was made for the benefit of creditors by a surviving partner. In that case, as in this, the creditors had loaned money to the surviving partner to pay a note of the firm. Van Vorst, J., in commenting upon the transaction, said: "If a firm obligation was retired by the use of the money loaned or advanced by Brown & Co., the surviving partner would have been entitled to be repaid out of the firm property. As the moneys of Brown & Co. in fact paid a firm obligation, I see no objection in the subrogation of

them in equity to the rights of the surviving partner, or to the regarding of them as entitled to be repaid out of the firm assets. That works injustice to no one." The learned judge concluded by ordering the complaint dismissed, thereby sustaining the validity of the assignment. This case was affirmed in the general term, 42 Hun, 528, and in this court in 116 New York, 487. This question, however, was not considered in either of the appellate courts.

In *Matter of the Estate of Davis and Desauque*, 5 Whart. 530, 34 Am. Dec. 574, it was held that after the dissolution of a copartnership the partner authorized to settle the estate may borrow money on the credit of the firm for the purpose of paying its debts, and if the credit be given in good faith, though with a knowledge of the dissolution, and the money borrowed be faithfully applied in liquidation of the debts of the partnership, the creditor has a claim against the firm assets, and is not to be considered as a creditor merely of the partner borrowing.

In the case of *Prudhomme v. Henry*, 5 La. Ann. 700, it was held that where a liquidating partner, after dissolution, has borrowed money to pay the debts of the firm, the partnership is liable so far as the evidence shows that the money was used for the benefit of the firm.

In the last two cases the partnerships were not insolvent, and the question arose as between the partners. The courts, however, recognized the claim of the lenders as one which ought to be paid by the partnership.

In the case under consideration, it is true that the partnership is insolvent, and the question arises as between the bank and creditors of the partnership, but the creditors have not been harmed or prejudiced by the action of the bank in loaning the money to the survivor, for the assets were increased in value to the amount of the loan, and the money drawn out of the bank was applied in extinguishment of the claims of the creditors, thus reducing to that extent the liabilities of the firm.

When a partnership is dissolved by the death of a partner, the survivor is entitled to the possession and control of the joint property for the purpose of closing its business, and to that end and for that purpose he may, according to the settled principles of the law of partnership, administer the affairs of the firm, and by sale, mortgage, or other reasonable disposition of the property, make provision for meeting its obliga-

tions. He may, for that purpose, borrow money, and give a valid pledge of the copartnership property for its repayment: *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460; *Emerson v. Senter*, 118 U. S. 3-8; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Butchart v. Dresser*, 4 De Gex, M. & G. 542; 10 Hare, 453; *In re Clough, Bradford Commercial Banking Co. v. Cure*, L. R. 31 Ch. Div. 326.

In *Case v. Beuregard*, 99 U. S. 119-124, Mr. Justice Strong, in commenting upon the rights of partners in a suit involving the marshaling of the assets, says: "The right of each partner extends only to the share of what may remain after payment of the debts of the firm and a settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity that partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have the privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. This equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence if he is not in a condition to enforce it, the creditors of the firm cannot be: *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Appeal of York County Bank*, 32 Pa. St. 446.

But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the application of those assets primarily to the payment of the debts due them, whenever the property comes under its administration.

In the case of *Saunders v. Reilly*, 105 N. Y. 12, 59 Am. Rep. 472, it was held that a mere general creditor of a firm having no execution or attachment has no lien whatever upon its personal assets; that while firm creditors are entitled to a preference over creditors of the individual members of the firm in the payment of their debts out of the assets, in the course of liquidation, their equity is not held or enforceable in their own right, but is a derivative one, practically a subroga-

tion of the equity of each individual partner to have the firm assets applied primarily to the payment of its debts, and where no such equity exists in favor of any member of the firm, the firm creditors have none, and therefore where a judgment is recovered against all the members of a firm upon a joint obligation, but not an indebtedness of the firm, the firm property may be levied upon and sold on execution issued on the judgment. See also *Dimon v. Hazard*, 32 N. Y. 65; *Stanton v. Westover*, 101 N. Y. 265; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; *Brown v. Higginbotham*, 5 Leigh, 583; 27 Am. Dec. 618; *Peyton v. Stratton*, 7 Gratt. 380; *Stebbins v. Wilbard*, 53 Vt. 665.

It appears to us that the conclusion is warranted from the authorities referred to that where a person in good faith loans money to a surviving partner, and where the money is faithfully applied by such partner in satisfaction of the liabilities of the firm, the claim becomes one which in equity should be paid out of the assets of the firm; and in an accounting between the survivor with the personal representative of the deceased partner, equity will recognize the right of the surviving partner to have the money so borrowed and applied by him repaid out of the assets of the firm, and an assignment so directing is not fraudulent.

Attention is called to the fact that the deceased partner left a will making the survivor his sole devisee and legatee, and it is claimed that he left no individual debts. If this were so, it is not apparent that it would affect the equities of the bank, but the evidence is silent upon the question as to whether or not the deceased left individual debts. The referee refused to so find, and we cannot assume that there were none.

It may also be claimed that, the firm being insolvent, the survivor has no equities to which the bank can be subrogated, for the reason that he is liable individually for the payment of the firm debts. But the bank is not asking for any relief by way of subrogation; it is only defending the provision, already made for it in the assignment, from the claim of fraud. Even though both the firm and the survivor were insolvent, the survivor still had the right to have his contract recognized, and to say which of the creditors should be paid first, and to so provide in his assignment: *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460.

It follows that the judgment should be reversed, and a new trial granted, with costs to abide the final award of costs.

VANN, J., dissents, upon the ground that the note preferred in the assignment as a firm debt was simply an individual debt of the surviving partner, who, as he did not bind the firm in creating the debt, could bind neither it nor its property by directing payment out of the firm assets.

Judgment reversed.

PARTNERSHIP — RIGHTS OF SURVIVING PARTNER. — For a full and complete discussion of the rights and duties of a surviving partner with respect to the partnership business, see extended note to *Shields v. Fuller*, 65 Am. Dec. 293 303, wherein is discussed his right to make an assignment of the partnership property and make a preference of creditors. See also *Woodward v. Brooks*, 128 Ill. 222; 15 Am. St. Rep. 104; *Robinson v. Simmons*, 146 Mass. 167; 4 Am. St. Rep. 299; *Salisbury v. Ellison*, 7 Col. 167; 49 Am. Rep. 347, and note. A surviving partner may convey partnership realty to pay partnership debts: *Walling v. Burgess*, 122 Ind. 299. See also *Patton v. Leftwich*, 88 Va. 421; 19 Am. St. Rep. 902, and note.

HAMER v. SIDWAY.

[124 NEW YORK, 582.]

CONSIDERATION FOR PROMISE, WHAT SUFFICIENT. — To constitute a valid consideration for a promise, it is not necessary for the promisor to be benefited, or for the promisee to be injured; a waiver of a legal right by the promisee at the request of the promisor is sufficient. And therefore a promise by an uncle to his nephew, that if the latter would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, he would pay him five thousand dollars, is founded upon a good consideration, and is enforceable.

DEFENSE OF STATUTE OF FRAUDS WAIVED BY FAILURE TO SET IT UP IN ANSWER WHEN. — Where it does not appear on the face of the complaint that the agreement sought to be enforced by the action is one prohibited by the statute of frauds, such defense cannot be made available unless it is set up in the answer.

DECLARATION OF TRUST, WHAT SUFFICIENT. — Where a person indebted to another in a certain sum of money writes to him recognizing the indebtedness; tells him that he will keep the money until he deems him capable of taking care of it; that he shall have it certain; that he does not intend to interfere with it; and that he may consider it on interest, — this is sufficient for the creation of a valid trust which is not within the operation of the statute of limitations.

ACTION upon an alleged contract. The plaintiff acquired the claim through several mesne assignments from William E. Story, 2d. The facts are stated in the opinion.

H. J. Swift, for the appellant.

Adelbert Moot, for the respondent.

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is, whether by virtue of a contract, defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the twentieth day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would, at that time, pay him, the said William E. Story, 2d, the sum of five thousand dollars for such refraining, to which the said William E. Story, 2d, agreed," and that he, "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that, unless the promisor was benefited, the contract was without consideration; a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forbore, or suffered by the party to whom the promise is made, as consideration for the promise made to him": Anson on Contracts, 63.

"In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise": Parsons on Contracts, 444.

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise": 2 Kent's Com., 12th ed., 465.

Pollock, in his work on contracts, page 166, after citing the definition given by the exchequer chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means, not so much that one party is profiting, as that the other abandons some legal right in the present or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years, upon the strength of the promise of the testator that for such forbearance he would give him five thousand dollars. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement; and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In *Shadwell v. Shadwell*, 9 Com. B., N. S., 159, an uncle wrote to his nephew as follows:—

"*My Dear Lancey*,—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

"Your affectionate uncle, .

"CHARLES SHADWELL."

It was held that the promise was binding, and made upon good consideration.

In *Lakota v. Newton*, an unreported case in the superior court of Worcester, Massachusetts, the complaint averred defendant's

promise that "if you [meaning plaintiff] will leave off drinking for a year I will give you one hundred dollars," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In *Talbott v. Stemmons*, Ky., Oct. 24, 1889 (not yet reported), the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, five hundred dollars, at my death, if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge, he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint, on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health; nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes*, 60 Mo. 249; 21 Am. Rep. 395.

The cases cited by the defendant on this question are not in point. In *Mallory v. Gillett*, 21 N. Y. 412, *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476, and *Berry v. Brown*, 107 N. Y. 659, the promise was in contravention of that provision of the statute of frauds which declares void all promises to answer for the debts of third persons unless reduced to writing. In *Beaumont v. Reeve*, Shirley's Lead. Cas. 6, and *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329, the question was, whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In *Duvoll v. Wilson*, 9 Barb. 487, and *In re Wilber v. Warren*, 104 N. Y. 192, the proposition involved was, whether an executory covenant against encumbrances in a deed given in consideration of natural love and affection could be enforced. In *Vanderbilt v. Schreyer*, 91

N. Y. 392, the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guaranty could not be enforced for want of consideration, for in building the house the plaintiff only did that which he had contracted to do. And in *Robinson v. Jewett*, 116 N. Y. 40, the court simply held that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." It will be observed that the agreement which we have been considering was within the condemnation of the statute of frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and therefore such defense could not be made available unless set up in the answer: *Porter v. Wormser*, 94 N. Y. 431, 450. This was not done.

In further consideration of the questions presented, then, it must be deemed established, for the purposes of this appeal, that on the thirty-first day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of five thousand dollars, and if this action were founded on that contract, it would be barred by the statute of limitations, which has been pleaded; but on that date the nephew wrote to his uncle as follows:—

"Dear Uncle, — I am now twenty-one years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me five thousand dollars. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February 6th, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:—

"Dear Nephew, — Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised

you. I had the money in the bank the day you was twenty-one years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right, and lose this money in one year. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. . . . W. E. STORY.

"P. S. — You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter"; and further, "that afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred, and assigned all his right, title, and interest in and to said sum of five thousand dollars to his wife, Libbie H. Story, who thereafter duly sold, transferred, and assigned the same to the plaintiff in this action."

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and *cestui que trust*? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated: Lewin on Trusts, 55.

A person in the legal possession of money or property, acknowledging a trust with the assent of the *cestui que trust*, becomes from that time a trustee, if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls: 2 Story's Eq. Jur., sec. 972. If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands, and stipulating for its investment on the creditor's account, will have the effect to create a trust: *Day v. Roth*, 18 N. Y. 448.

It is essential that the letter, interpreted in the light of surrounding circumstances, must show an intention on the part

of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee: *White v. Hoyt*, 73 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of five thousand dollars, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say, "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him, so that when he should be capable of taking care of it he should receive it, with interest. He said: "I had the money in the bank the day you were twenty-one years old that I intended for you, and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank, which he declared was not only there when the nephew became twenty-one years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it; for the uncle said, in substance and in effect: "This money you have earned much easier than I did . . . you are quite welcome to. I had it in the bank the day you were twenty-one years old, and don't intend to interfere with it in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the general term seems to have taken the view that the trust was exe-

anted during the lifetime of defendant's testator by payment to the nephew; but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed, and the judgment of the special term affirmed, with costs payable out of the estate.

CONSIDERATION, WHAT MAY CONSTITUTE. — Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration: *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80. Abstaining for a certain time from the use of intoxicating drinks is a sufficient consideration to support a contract: *Lindell v. Roken*, 60 Mo. 249; 21 Am. Rep. 396.

STATUTE OF FRAUDS AS A DEFENSE, whether must be pleaded or not, and whether it will be considered as waived if not pleaded, see *Fenney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162, and note 171, 172; *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242.

TRUST, WHAT DECLARATION IS SUFFICIENT TO RAISE: See *Mannix v. Purcell*, 45 Ohio St. 102; 15 Am. St. Rep. 562, and note 583, 584; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531, and note; *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242, and note. A parol declaration of trust with respect to personalty is sufficient: *Pitney v. Bolton*, 45 N. J. Eq. 630; *MacConnell v. Lindsay*, 131 Pa. St. 476.

KNOWER v. CENTRAL NATIONAL BANK. FIRST NATIONAL BANK OF PATERSON v. SAME.

[124 NEW YORK, 502.]

ASSIGNEE FOR BENEFIT OF CREDITORS BOUND TO EXECUTE ASSIGNMENT UNTIL AVOIDED. — An assignment for the benefit of creditors in due form, being valid as between the parties, and if fraudulent as to creditors, only voidable by adjudication, at their election, or that of some one of them, must, until an attack is made with a view to such a judicial determination, be treated as valid, and its directions be executed by the assignee.

PAYMENT BY ASSIGNEE FOR BENEFIT OF CREDITORS TO CREDITOR VESTS TITLE IN LATTER, THOUGH ASSIGNMENT SUBSEQUENTLY AVOIDED. — A payment made by an assignee for the benefit of creditors to a creditor of the assignor of the amount of the debt due him, pursuant to the directions in the assignment, before any lien is obtained upon the fund, is effectual to vest in such creditor title to the money so paid, although the assignment be, in an action subsequently commenced, adjudged fraudulent and void as against the creditors of the assignor. And the mere fact of knowledge on the part of the creditor so paid of the intent of the debtor to defraud his other creditors does not prejudice his right to seek and obtain payment.

ACTIONS brought to require the defendant bank to refund a sum of money received by it from the assignee for the benefit of creditors of Halstead, Haines, & Co. The first complaint alleged that in July, 1884, Halstead, Haines, & Co. made to one May a general assignment for the benefit of their creditors, and by it directed the assignee to pay a number of preferred debts, and, among others, the claim of the defendant, amounting to forty thousand dollars; that on October 17, 1884, he paid this sum to the bank; that on September 20, and October 18, 1884, the plaintiffs recovered judgments against Halstead, Haines, & Co., upon which executions were issued and returned unsatisfied; that in January, 1885, plaintiffs commenced actions to set aside the assignment as fraudulent, and recovered judgments in said actions on December 12 and 13, 1885. It was also alleged on information and belief that in August, 1884, Halstead, Haines, & Co., after making the assignment, with fraudulent intent colluded with their preferred creditors, including the defendant bank, so that it, with full knowledge of the fraudulent design of Halstead, Haines, & Co., and with like design on its part, obtained judgment against Halstead, Haines, & Co. for their claim so preferred, it being confessed by them in favor of the bank; that executions were issued on these judgments to the sheriff, requiring him to seize and hold the assigned property, and thus secure it from the efforts of the unsecured creditors; that the sheriff allowed the assignee to sell the property under the assignment, which he did, and the executions were returned unsatisfied. It was also alleged that when the assignee paid the money to the defendant, it knew that a suit was pending brought by creditors of Halstead, Haines, & Co., other than these plaintiffs, to set aside the assignment as fraudulent, and that in January, 1888, judgment was rendered in this action, setting aside the assignment. The complaint then alleged that the assignment was made by Halstead, Haines, & Co. with intent to hinder, delay, and defraud their creditors, including the plaintiffs. The complaint in the second action was substantially the same, except that it did not allege the recovery of any judgment by plaintiff setting aside the assignment; nor did it claim that the defendant bank was in any way connected with any fraud in the assignment or its execution. One of the grounds of demurrer in each case was, that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were sustained. Other facts appear from the opinion.

John J. Adams, for the appellants.

George A. Strong, for the respondent.

BRADLEY, J. This controversy presents the question whether or not a creditor of an assignor for the benefit of creditors can retain the money paid to him by the assignee pursuant to the direction in the assignment as against another creditor, who, by action subsequently brought, succeeds in setting aside the assignment as fraudulent against the creditors of the assignor. It is urged on the part of the plaintiffs that the creditor, receiving payment of his debt from the assignee, takes it subject to the condition that the assignment remains effectual, and that when the assignment falls, the title of the creditor to the money so paid him pursuant to its direction fails, and that, for the purpose of the remedy of the attacking creditors, the money so paid must be treated as part of the estate of the debtor, to be accounted for by the creditor receiving it. This proposition is founded upon the assumption that he receives the payment and takes the money through the title vested by the assignment in the assignee, and not otherwise.

It is a familiar rule that a debtor may voluntarily pay such of his creditors as he pleases, and they may take payment to the exclusion of others, and thus exhaust all his property. And at the time the one in question was made, an insolvent debtor might legitimately accomplish the same thing by means of a preferential assignment of his entire property for the benefit of his creditors. Although this necessarily had the effect to withdraw his estate from the ordinary legal process, and thus operated to hinder the creditors in the collection of their debts, it was valid if made in good faith, and did not unnecessarily, by its directions, delay the appropriation of the assigned property to the payment of creditors in the order provided for by the assignment. When the trust is accepted by the assignee, he may be compelled to execute its directions, and it is irrevocable by the assignor. And the question whether or not an assignment is fraudulent in fact as against the creditors of the assignor is not important for the purposes of the execution of it by the assignee, unless an attack by action is made upon it by them, or some of them. Until then his duty to proceed in its execution continues. And, consistently with that duty, he is entitled to have allowed to him all payments before then made by him of and upon debts of the assignor in accordance with the instructions given by the

terms of the assignment: *Ames v. Blunt*, 5 Paige, 15; *Collumb v. Read*, 24 N. Y. 505; *Pond v. Comstock*, 20 Hun, 492; 87 N. Y. 627.

All the creditors of the debtor are entitled to payment of their lawful claims against him if his property is sufficient to pay them; and those given a preference by his assignment are entitled to payment by force of the directions contained in it, while the assignee is at liberty to execute them. The title is vested in an assignee for the purpose merely of executing the trust in the manner directed, and essentially so to enable him to do it. And when payment is made by an assignee to the creditor pursuant to such directions, the latter receives the fund from the debtor through the execution of the trust, and his title is supported by the pre-existing debt upon which payment is made, pursuant to the right of the debtor to make and the creditor to receive it. By the commencement of an action in equity by a judgment creditor to reach the property of his debtor, he obtains a lien upon the choses in action and equitable interests of the latter, which lien becomes effectual upon the recovery of judgment for the relief sought: *Edmeston v. Lyde*, 1 Paige, 637; 19 Am. Dec. 454; *Eager v. Price*, 2 Paige, 333. This rule is not to the same extent applicable to property subject to levy of execution: *Albany City Bank v. Schermerhorn*, Clark & F. 297; *Davenport v. Kelly*, 42 N. Y. 193. No action affecting this case in which any of these plaintiffs were parties, or represented as such, was brought until after payment was made to the defendant; and no lien by relation to a time prior to that was acquired by them on the fund so paid. They must rest their claim to recover upon the position that because the assignment was fraudulent as against the creditors of the assignor, the title to the money paid never passed to the defendant, but remained in the debtor. It is true that the theory upon which property fraudulently assigned is reached by a creditor on adjudication to that effect is, that title has not passed from the assignor, and such is the ground upon which a levy of execution upon assigned property is effectually supported. It may be observed that an assignment being valid between the parties to it is, if fraudulent as against creditors, only voidable by adjudication at their election, or that of some or one of them; and unless an attack is made with a view to such judicial determination, it will be treated as valid, and must be executed accordingly. And when faithfully executed by the assignee without such challenge by any creditor, it is difficult

to see any sound principle upon which the results should be subverted. Diligence may defeat its execution, but to hold that, so far as the trust has been performed, no rights have been effectually taken from it would render it unsafe for any creditor to accept payment otherwise than by force of adjudication, or after the validity of an assignment is in that manner established. It is, however, urged that an antecedent debt does not furnish a supporting consideration for money paid to enable the receiving creditor to retain it as against another who proceeds upon or successfully for an adjudication of the invalidity of an assignment pursuant to which the payment is made. It is not seen that the doctrine sought to be applied in its relation to the transfer of property necessarily aids the plaintiffs. The sale of property to a creditor in payment of a debt, and taken by the latter solely for the purpose of such payment, cannot be defeated by another creditor by reason of the fraudulent intent on the part of the vendor, although the purchaser was cognizant of such intent of the vendor: *Dudley v. Danforth*, 61 N. Y. 626. And while the sale to the creditor has in the debt due him a valuable consideration for its support, he will not, without the aid of some new consideration, be treated as a *bona fide* purchaser in such sense as to take title paramount to a prior equity or lien existing in favor of another: *Ray v. Birdseye*, 5 Denio, 619; *Wood v. Robinson*, 22 N. Y. 567; *Seymour v. Wilson*, 19 N. Y. 421. This doctrine would be applicable to the case at bar if the plaintiffs had acquired a lien on the fund or the property producing it prior to the time the payment was made to the defendant bank. But the contrary is the fact; and at that time the equity of the defendant was equal to that of plaintiffs. The title of the defendant to the money paid upon its claim did not depend for support upon that of the assignee, as would be the case of a stranger taking a transfer of property from the trustee, but the payment was a performance of the directions of the assignor in his assignment, and by force of those directions the fund passed from the assignor through the act of the assignee to the defendant in discharge of the debt due to it; and it would seem that the latter could rest upon its right to take the money paid, and retain it, supported by title, as effectually as if it had, without the aid of an assignee, been paid to him directly by the debtor: *National B. & D. Bank v. Hubbell*, 117 N. Y. 397; 15 Am. St. Rep. 515. This view is not inconsistent with the fact that, when an assignment is set aside, the functions of

the assignee cease, and the entire provisions of the instrument fall. By reason of the voidable rather than the void nature of such an instrument, and of the fact that it is valid between the parties to it, the instructions given by it remain effectual, and the execution of them may proceed until interrupted by some legal process or proceeding having that effect. The view here taken is, that the invalidity of the assignment, established in the subsequent actions of the plaintiffs, did not have the effect to restore the fund paid to the defendant to the estate of the debtor for the purpose of relief in their behalf, nor was it subject to any lien in their favor as creditors of the assignor.

Our attention is called to no adjudicated case presenting this precise question, but *Murphy v. Briggs*, 89 N. Y. 446, has analogously, in principle, some application to the subject. There a debtor conveyed real estate in fraud to his creditors, and at his request the grantee made a mortgage upon the premises to a creditor of the grantor to secure the payment of a debt due from the latter to the mortgagee. The position was taken by the attacking creditors there, as here, that as the deed was set aside, there was no title in the grantee to support the mortgage. But the court held, in effect, that the security for the payment of the debt was, in legal effect, furnished by the grantor through his grantee, who then, being apparently vested with the legal title, was the instrument to execute the mortgage, and that the mortgagee had, in the debt which it was given to secure, a valuable consideration. In that case the mortgage was dependent for its support upon title in the mortgagor, while in the present one the payment may have been effectually made upon the mere instructions or directions of the debtor given to a person appointed by him to make it, unaided by title in the person executing such directions. The nature of the relation between an assignor and assignee for the benefit of creditors is not one of contract, but the assignee takes his position as such by appointment; and because the assignor, after making such assignment embracing his directions, ceases to have any dominion over the property, any successor to the assignee, on his retirement, by resignation or otherwise, from the trust, can only be appointed by the court. This has no essential bearing upon the question here, further than it tends to illustrate the fact that the title is given to the assignee simply to enable him to execute the directions of the assignor, embraced in the instrument by which he is appointed. The fact, as has been held, that the assignee cannot, as against

a creditor successfully attacking an assignment, retain moneys in payment of a preferred debt due from the debtor to him, or to a firm of which he is a member, is not inconsistent with the right of another creditor to hold that paid to him upon a debt due him from the assignor. The reason for this difference evidently arises out of the relation of the assignee as a party to the instrument creating a trust, and who is charged with its execution; and, theoretically, his right to funds which he is authorized by the assignment to take and apply to his own use is not entirely perfected until his account of the execution of the trust is rendered, and in some manner approved or established. This rule is generally applicable to trustees, and by statute is applied to executors and administrators who have claims against the estates represented by them.

In *Hone v. Henriquez*, 13 Wend. 240, 27 Am. Dec. 204, the question had relation to the claim of right by a creditor to set off his debt against the proceeds of property placed by the assignor in his hands to sell. The assignment was adjudged fraudulent and void, and it was properly held he could not make the set-off. His was not a case of payment, and he had no claim of title. The question here did not arise in that case. These views lead to the conclusion that payment by the assignee to a creditor of the assignor of the amount of the debt due him, pursuant to the directions in the assignment, before any lien is obtained upon the fund, is effectual to vest title in such creditor to the money so paid, although the assignment is, in an action subsequently commenced, adjudged fraudulent and void as against the creditors of the assignor.

We have thus far proceeded upon the assumption that the defendant had not in any manner participated in the fraud charged against the assignor.

The allegations in the complaint in the *Knower* action charging the collusion, after the assignment was made, of the assignors with the defendant and other preferred creditors, resulting in judgments and executions, and finally a sale of the property by the assignee, and the return of the executions unsatisfied, would be effectual to support the action if the validity of the defendant's debt against the assignor were challenged by any allegation in the complaint. But in considering the question arising upon the charge referred to, it must still be assumed that such debt was honestly due from the assignor to the defendant. This charge had relation only to transactions after the assignment was made, and was to the effect

that the defendant, with knowledge of the fraudulent design of the assignor, was seeking to obtain payment of the debt due to it. The only allegation tending to show a purpose to prejudice other creditors was, that the defendant and such other preferred creditors directed the sheriff to seize and hold the assigned property upon the executions, and "thereby secure the same from the just and legal efforts of the unpreferred creditors to secure payment thereof of their just demands against the same, and to enable the said assignee to sell and dispose of the same under said alleged general assignment." No inference necessarily arises from such allegation that the defendant acted with any purpose other than to secure the payment of its own debt; and with that view it was at liberty to procure confession by the assignor of judgment, issue execution, and direct the sheriff to levy it on the property. And, as has already been observed, the mere fact of knowledge on the part of a creditor of the intent of his debtor to defraud his creditors by the disposition of his property to pay or in payment of the debt due from him to the former does not prejudice the right of the creditor to seek and obtain payment. The case of *Mackie v. Cairns*, 5 Cow. 547, 15 Am. Dec. 477, has no necessary application to this branch of the present case. There the assignor, after making a general assignment for the benefit of creditors, which, by reason of trusts reserved for his benefit, was apparently fraudulent as against his creditors, confessed a judgment to the assignees, as such, while the assignment remained valid between the parties to it. The assignment and judgment were held to be fraudulent as against the creditors. The judgment so confessed and taken was intended to be resorted to only in the event the assignment should be adjudged invalid, and in the mean time the purpose of the assignees was to proceed in execution of the assignment. The result of the final determination was, that the judgment was infected with the same vice as was the assignment itself. In the present case, the confession of judgment was to a creditor, and founded upon a valid debt, and it must be assumed that the defendant took it for his own benefit. This it had a right to do.

It is not seen how knowledge of the defendant, at the time of the receipt of payment of its debt, that a suit was then pending in behalf of parties, other than any of the plaintiffs here, to set aside the assignment can aid the plaintiffs, or, as against them, prejudice the defendant. The other action

referred to was, in its effect and result, available only to the parties plaintiff in it, and for the purpose and to the extent of their claim only, against the assignor, would the adjudication in their favor set aside the assignment: *Bostwick v. Menck*, 40 N. Y. 383.

There is no other question requiring consideration.

The judgments should be affirmed.

ASSIGNMENT FOR BENEFIT OF CREDITORS — DUTY AND LIABILITY OF ASSIGNEE. — The assignee must exert himself to carry out the object for which the assignment was made: *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381; and he is protected as to payments of claims made by him before any adverse claims are set up: *Note to Wilson's Accounts*, 45 Am. Dec. 709; as well as to conveyances so made by him: *Coombs v. Unknown Persons*, 82 Me. 388. Bidders to whom property has been struck off at an assignee's sale cannot complain of the improper methods of conducting such sale, when they had notice of the irregularities at the time of the sale: *Glenn v. Mickey*, 130 Pa. St. 586.

WHITTEMORE v. JUDD LINSEED AND SPERM OIL Co.

[124 NEW YORK, 566.]

RELEASE OF ONE OF TWO JOINT DEBTORS DOES NOT DISCHARGE THE OTHER WHEN. — Where a release of one of two joint debtors expressly provides that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged thereby. The equitable rule which now prevails gives to a release operation according to the intention of the parties and the justice of the case.

UNDIVIDED PART OF DEMAND MAY BE SOLD AND TRANSFERRED; and if all the owners of the demand unite in a suit upon it, the fact of the assignment of a part constitutes no defense. Where, in an action on a joint claim against two defendants, one only of whom defends, a decision is given in favor of the plaintiff, only one roll is filed, but separate judgments are entered against the defendants, that against the one who defended being greater than that against the other by the amount of the costs and interest, the judgments cannot be considered as joint, and a release of one of them will not, in the absence of any claim of payment by either of them, affect the right of the judgment creditor against the other.

ACTION to restrain the collection of a judgment against H. W. Hubbell by the defendant, and to have it adjudged that such judgment, so far as it was a claim against him, was satisfied and discharged. Hubbell having died pending the suit, the action was continued by his administrator. Hubbell and one R. L. Taylor, who had been engaged in certain joint enterprises, became insolvent in 1867, and made a joint assignment of their joint estate and separate assignments of their

individual estates to assignees for the benefit of creditors. The oil company had a claim against them, on which Taylor denied any liability. The company, after agreeing to compromise the claim, so far as Taylor was concerned, for fifty cents on the dollar, in case it established his liability therefor, brought suit against both Taylor and Hubbell. Taylor alone defended, but on the trial a decision was rendered in favor of the company. But one roll was filed. The final judgment was dual in form, a separate judgment being entered against Hubbell for \$40,950.29, and against Taylor for \$43,420.70, the difference in amount representing the difference in costs and interest. On August 15, 1872, the oil company assigned to the defendant Lord all their claims and demands against Taylor individually, and especially all its right, title, and interest in and to this judgment, and in and to money due and to become due under the same. This assignment further provided: "It is expressly understood that said Judd Linseed and Sperm Oil Company are to retain, and do expressly retain, all their claims and rights of every nature against the joint property and estate of said Robert L. Taylor and Henry W. Hubbell, and against the individual property and estate of said Henry W. Hubbell; it being intended hereby to transfer only such claims as they have against the said Robert L. Taylor individually, and his individual estate, in whatever way the same may be made available for the payment thereof." Negotiations for the settlement of the several estates followed, with the object of releasing and discharging the assignee, and of transferring to Hubbell certain claims, particularly one against the United States growing out of the destruction of a ship by the confederate cruiser Alabama, which, he claimed, had not passed to the assignee. To accomplish this object, Hubbell professed to have procured, and to be able to procure, releases of the assignee from all the creditors except four, among whom was the oil company. A tripartite agreement was made between the surviving assignees and Taylor and Hubbell, which recited these facts, and the fact that the oil company's claim was to remain outstanding. In these negotiations Mr. Lord represented Taylor, the assignees, and certain creditors, and Mr. Peet represented Hubbell. On August 8, 1874, Mr. Peet delivered two releases; one dated September 30, 1873, which was an agreement between certain creditors and Hubbell, and released and discharged the assignees from all claims and demands, and provided that nothing contained

therein should impair or affect the claims of said creditors against Hubbell individually, or prejudice their rights against him personally, or any estate of his not in the hands of the assignees. The second release was dated January 5, 1874, and was an agreement with Hubbell of a like character, and released Taylor from all claims and demands against him, and the assignees from all claims and demands and right of accounting against them, and contained a similar reservation of the releasors' claims against Hubbell individually, and against any estate of his not in the hands of the assignee. The oil company was a party to each of these instruments. The defendant Lord also executed and delivered to Hubbell a release, under seal, from all claims against him or his individual estate, upon certain demands, of which Lord claimed to be the owner, among which the oil company's claim was one. A question seems to have arisen as to Lord's authority to execute this release under the assignment of August 15, 1872, and Hubbell subsequently procured from the oil company a further assignment, dated October 6, 1874, whereby said company assigned to Lord "all their claims against the joint property and estate of Robert L. Taylor and Henry W. Hubbell in the hands of their assignees under the assignment dated October 26, 1867, under and by virtue of a judgment against said Taylor and Hubbell in the court of common pleas, etc., for \$43,420.70, granting to Lord power and authority to ask and demand the same from the assignees and from any person or persons, excepting as against Hubbell, or any individual estate or joint estate hereafter realized by him." On April 1, 1876, the oil company issued an execution upon said judgment, with directions to the sheriff to satisfy the same out of Hubbell's property.

William C. De Witt and Edwin B. Smith, for the appellant.

Joseph H. Choate, for the respondent the Oil Company.

S. P. Nash and D. D. Lord, for the respondent Lord.

BROWN, J. The appellant claims that Hubbell's discharge from the judgment was accomplished in two ways: 1. By the release executed by the defendant Lord, and delivered to him on August 8, 1874; 2. By the release of Taylor by the oil company by the instrument of January 5, 1874.

The first ground is the one upon which relief was based in the complaint. The second is not there mentioned or made the basis of the judgment asked for.

While I have grave doubt whether the second claim is available to the appellant under his complaint, or whether the question was raised at the trial by any proper and sufficient request to the court thereon, as the facts upon which the claim is now made appear in the findings of the court, the point is considered as if it was properly before us.

The second ground upon which the discharge is claimed will be considered first.

The strict common-law rule is, that if two persons be bound jointly and severally in an obligation, and the obligee voluntarily and unconditionally releases one of them, both are discharged, and either may plead the release in bar.

But the legal operation of a release of one of two or more joint debtors may be restrained by an express provision in the instrument that it shall not operate as to the other.

This question was recently considered in this court in the case of *Hood v. Hayward*, 124 N. Y. 1.

In that case, one surety upon a non-resident executor's bond was released and discharged by the devisees and legatees under the will, and the appellant's contention was, that by virtue of that release to his co-surety he also was released.

That contention was overruled, and it was held that he was not discharged, and the decision rested upon an express provision in the release that it should not be construed as in any way affecting any claim or demand which the releasors had or might have against the non-resident executor or against the appellant as surety on his bond.

In addition to the authorities cited by Judge Potter in support of that opinion I refer to the following: 1 *Parsons on Contracts*, 5th ed., 29; *Kirby v. Taylor*, 6 Johns. Ch. 246; *Hopk.* 309-334; *Rogers v. Hosack*, 18 Wend. 319; *Hosack v. Rogers*, 25 Wend. 313; see opinion of Cowen, J.; *Solly v. Forbes*, 2 Brod. & B. 38; *North v. Wakefield*, 13 Ad. & E. 536; *Burke v. Noble*, 48 Pa. St. 168; *Yates v. Donaldson*, 5 Md. 389; *Edwards v. Varick*, 5 Denio, 665-699; *Lysaght v. Phillips*, 5 Duer, 106-116.

The rule deducible from all the authorities is, that equity always gives to a release operation according to the intention of the parties and the justice of the case, and although many early cases may be cited to the effect that the rule applied by courts of law was otherwise, and that a saving clause repugnant to the nature of the grant was void, and that the grant remained absolute and unqualified, such is not the modern rule of construction.

The equitable rule now prevails, and a release is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation.

Testing the releases in this case by the clear and manifest intention of the parties and the occasion of giving it, its operation will be confined to Taylor, and it in no way tended to release or discharge Hubbell.

By the terms of the contract, Hubbell was to remain liable, and under all the authorities, the release of Taylor operated to discharge him alone.

But the two papers appear to have been delivered by Hubbell's attorney on August 8, 1874, and for the purpose of this appeal we must assume their delivery to have been Hubbell's act.

The purpose of their execution and delivery is shown by the tripartite agreement executed by and between the surviving assignees and Taylor and Hubbell.

This agreement looked to the settlement of the several estates and the discharge of the assignees, and to accomplish that object, Hubbell professed to have procured, or to be able to procure, releases to said assignees from all outstanding creditors of the joint estate, and from his individual estate, except four, one of whom was the oil company, and it was therein expressly stated that the four excepted claims were to remain outstanding. Such agreement between them provided that a certain claim against the United States, arising out of the destruction of a ship by the confederate cruiser *Alabama*, was not a part of the joint estate assigned, but belonged to Taylor and Hubbell individually, and other claims, with the consent of Taylor, were to be assigned to Hubbell to enable him to procure releases from creditors of the joint estate.

Pursuant to this agreement, the two releases in question were delivered by Hubbell, and he must be held to be bound by the express stipulation that the oil company's claim was to remain outstanding against him, and that so far as the release to Taylor was concerned, it expressly limited its operation to Taylor, and was intended to discharge him alone.

In other words, he must be deemed to have consented to the latter provision.

In *Rogers v. Hosack*, 18 Wend. 336, Judge Cowen said, in speaking of the rule that the release of one of two joint debtors operates to discharge both: "The rule has generally,

if not universally, been applied to cases where such co-debtors were released without the consent of the other. . . . The release is like the leaving off of the seal from a bond, which subverts the whole contract. . . . But the case is different when the alteration is by the consent of all the parties, accompanied with an intention that those only should be discharged whose names or seals are torn off in the case supposed, or who are released as in the case at bar."

After discussing the facts of the case before him, he reaches the conclusion that the debtor who claimed the benefit of the strict rule intended to remain liable, and said: "Upon principle there is nothing to prevent such an agreement."

To the same effect is *Burson v. Kincaid*, 8 Penr. & W. 57.

Upon the assumption, therefore, that the judgment against Taylor and Hubbell was joint, our conclusion is, that Hubbell was not discharged by the release of January, 1874.

But the conclusive fact in this connection is, that no joint judgment ever was entered against Taylor and Hubbell. The whole of the appellant's argument is built upon the assumption that such a judgment existed, and his effort has been to convince us that although the judgment was not joint in form, yet it must and should be so treated by the court on this appeal.

Having exhausted all the remedies possible in an ineffect-ive effort to correct the judgment and make it joint, he asks this court to so regard it, for the purposes of enabling him to invoke the aid of a harsh and technical rule of law, to discharge him from an obligation towards the payment of which it does not appear that he has ever contributed a cent.

To do so would manifestly subvert and overthrow the intention of the parties in their various complicated dealings had in the settlement of the several estates. They had a right to contract upon the faith of the record as it stood, and it is not unreasonable to assume that if the judgment had been joint in form, the result sought would have been reached in another way, and the case not embarrassed with the questions that have arisen upon the several assignments and releases that have been executed.

The fact that is prominent all through the negotiations is, that the oil company never intended to release its claim against Hubbell, and Hubbell was well aware of that fact.

The other ground for the judgment sought rests wholly

upon the question whether Mr. Lord had authority to execute and deliver the release given to Hubbell.

The trial court found that such instrument was executed without any power or authority, and, as to the oil company's claim, was wholly inoperative and void.

It may be conceded that the assignment of October 6, 1874, was intended to relate back to and have effect as of a date prior to the execution of the release.

By the terms of the instrument of August, 1872, the oil company assigned only its claim against Taylor individually, and against his individual estate in the hands of the assignee.

By the instrument of October, 1874, it assigned its claim against the joint property of Taylor and Hubbell. In both, it expressly reserved its claim against Hubbell individually.

This was in entire harmony with the tripartite agreement, which recited the fact that the assignees had never realized anything from Hubbell's individual estate, and which contemplated the discharge of the assignees by the creditors, but that the oil company should retain its claim against Hubbell.

The legal conclusion which the appellant asked the court to draw from the two assignments was, that they were ineffectual to divide the claim, and carried to the assignee the right to collect the whole judgment.

That is, that although the assignor intended to sell and the assignee to buy but a part or share of the claim, and clearly expressed such intent in the deed of assignment, the law gives to the instrument an entirely different effect, and transfers what neither intended should pass by it.

I know of no principle of law that works such a result, and no authority is cited to sustain it.

The authorities that are cited hold simply that a creditor cannot split up a single cause of action without the consent of the debtor.

The reason for this rule is, that to permit a cause of action to be divided would subject the debtor to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any assignment by which it may be broken into fragments: *Mandeville v. Welch*, 5 Wheat. 277.

But the rule goes only to the right to sue as assignee of a part of a single cause of action.

It does not deny the right to sell and transfer an undivided

part of a demand. And if all the owners unite in a suit upon it, the fact of the assignment of a part constitutes no defense.

We need not consider, in this case, what title or authority Mr. Lord acquired under the assignment to him, or what would have been the effect on the claim if Taylor or the assignee had paid it in full to Lord. No such question arises.

The only pertinent inquiry is, Did Lord, under the assignment of the demand against Taylor, acquire power to release Hubbell?

That inquiry was properly answered at the trial, and there was no error in the refusal to find the request I have quoted.

If the assignment was ineffectual to divide the claim, the title remained in the oil company.

But as the judgments were several, and not joint, and no question of payment by either debtor arises, it is not perceived why the judgment against Taylor could not be separately assigned. No one was prejudiced by such a transaction, and the rights of the debtors between themselves remain unimpaired and unaffected.

The claim that Mr. Lord incurred some liability to Hubbell in case the release was ineffectual to discharge him is not available on this appeal. No motion was made to amend the complaint, except in respect to the demand for judgment. The claim against Lord could not stand upon the allegation of the complaint, and the court properly denied the motion to amend.

The judgment should be affirmed.

JOINT DEBTORS. — AS TO THE EFFECT OF THE RELEASE OF ONE OF TWO JOINT DEBTORS, see *Eldred v. Peterson*, 80 Iowa, 264; 20 Am. St. Rep. 416. The release of one joint debtor releases the co-debtor: *Berry v. Gillis*, 17 N. H. 9; 43 Am. Dec. 584, and note; unless the remedy against him is expressly reserved: *Yates v. Donaldson*, 5 Md. 389; 61 Am. Dec. 283, and note; *Merriman v. Barker*, 121 Ind. 74. A joint debtor who has not paid his share cannot complain against a judgment rendered against his co-obligor for an amount greater than that for which such co-obligor is liable: *Scharff v. Noble*, 67 Miss. 143. A parol agreement by the payee of a note to release one of three makers as to two thirds of the debt, and permit the other portion to be paid in a certain manner, is a release of the other two makers upon their payment of their proportionate shares: *Seligman v. Pinet*, 78 Mich. 50. Several debtors being jointly liable for a debt, an agreement by the creditor to release one from further payment and from liability for contribution does not discharge the others: *Benton v. Mullen*, 61 N. H. 125. Payment by one debtor of a judgment recovered against all of several joint debtors extinguishes the whole recovery: *Caldwell v. Martin*, 29 S. C. 22.

ASSIGNMENT OF PART OF A DEMAND. — A part of a chose in action may be assigned: *Exchange Nat. Bank v. McLoon*, 73 Me. 498; 40 Am. Rep. 338. *Contra, Thalhimer v. Brinckerhoff*, 3 Cow. 623; 15 Am. Dec. 308. The assignment of part of a demand may be upheld in equity, although void at law: *Grain v. Aldrich*, 28 Cal. 514; 39 Am. Dec. 423, and note; *Kingsbury v. Burvill*, 151 Mass. 190.

RIGGS v. COMMERCIAL MUTUAL INSURANCE CO.

[125 NEW YORK, 7.]

STIPULATION THAT THE DECISION IN ONE CASE SHALL GOVERN ANOTHER is valid and enforceable.

INSURANCE — POLICIES NEED NOT DISCLOSE THE NATURE OF THE INTEREST of the assured, unless some condition in them requires such disclosure.

INSURANCE — INTEREST TO WHICH IT ATTACHES. — A policy, if otherwise valid, attaches to whatever insurable interest the assured had, whether as owner or otherwise.

INSURABLE INTEREST. — **WHENEVER THERE IS A REAL INTEREST** to protect, and a person is so situated with respect to the subject of insurance that its destruction would, or might reasonably be expected to, impair the value of that interest, the insurance of such interest is not a wager within the meaning of the statute prohibiting wager policies.

INSURABLE INTEREST. — **STOCKHOLDER OF A CORPORATION** has an insurable interest in the corporate property.

David Willcox, for the appellant.

George Zabriskie, for the respondent.

ANDREWS, J. The defendant is, we think, precluded by the stipulation of January 10, 1889, from raising any question on this appeal except as to whether Tobias, the assignor of the plaintiff, by reason of his being a stockholder in the Merchants' Steamship Company, had an insurable interest in the Falcon when the policy was issued, and perhaps the further question whether that interest, if it existed, was covered by the policy. The situation when the stipulation was made was this: The judgment which the plaintiff recovered at the trial term had been reversed at the general term, and a new trial had been ordered, and the plaintiff was about to appeal from the order of reversal to this court. The Merchants' Steamship Company had recovered judgment against the defendant in the same court on its policy on the same vessel, similar to the policy issued to the plaintiff, and this judgment had been affirmed by the general term, and the defendant had brought an appeal to this court, which was then pending. There was one question common to both cases, viz., whether there had been an absolute total loss of the vessel insured, without which

it was conceded there could be no recovery. In the case of the Merchants' Steamship Company this was the sole question. In this case there was the additional point whether the plaintiff had an insurable interest. The parties to the stipulation assumed that the question of total loss would be conclusively determined as to both cases by the result of the appeal in the case of the Merchants' Steamship Company, but if the judgment in that case was affirmed, it would still leave open in this case the question of insurable interest. Under these circumstances the parties entered into the stipulation, by which the plaintiff waived his right to appeal to this court from the order of reversal upon the defendant's consenting that if the judgment in the steamship company's case should be affirmed there should then be a reargument in this case before the general term of the question of the plaintiff's insurable interest, which consent was given; and the stipulation further provided "that the decision of the general term on such reargument should be final so far as the plaintiff was concerned, but without prejudice to any right in defendant to appeal therefrom." This court affirmed the judgment in the steamship company's case, and the reargument on the question of the plaintiff's insurable interest was then had before the general term, whereupon the general term reversed its former decision upon the point, and affirmed the judgment of the trial term. The present appeal is from the judgment of affirmance. It was the plain purpose of the stipulation that the defense common to both actions should abide the decision in the steamship company's case, leaving open in this action the distinct and separate question of insurable interest only. The stipulation was valid, and governs this appeal: *Townsend v. Masterson etc. Co.*, 15 N. Y. 587.

The question whether a stockholder in a corporation, as such, has an insurable interest in the corporate property, which he may protect by an insurance of specific tangible property of the corporation, is the question now presented. The policy does not disclose the nature of the interest of Tobias in the vessel insured. But this was not necessary, unless required by some condition of the policy: *Lawrence v. Van Horne*, 1 Caines, 276; *Tyler v. Aetna Fire Ins. Co.*, 12 Wend. 507. The policy, if otherwise valid, attached to whatever insurable interest he had, whether as owner or otherwise. What constitutes an insurable interest has been the subject of much discussion in the cases, and is often a question of great diffi-

culty. It is quite apparent that the tendency of decisions in recent times is in the direction of a more liberal doctrine upon this subject than formerly prevailed: May on Insurance, sec. 76. Contracts of insurance, where the insured had no interest, were permitted at common law: *Craufurd v. Hunter*, 8 Term Rep. 13; but the manifest evils attending such contracts, and the temptation which they afforded to fraud and crime, led to the enactment in England of the statute 19 Geo. II., c. 37, prohibiting wager policies, and this was followed by the enactment in this state of a similar statute (1 R. S. 632) prohibiting wagers; but to prevent the application of the statute to cases of insurance, by way of security and indemnity it was provided that it should "not be extended so as to prohibit nor in any way affect any insurances made in good faith for the security or indemnity of the party assured, and which are not otherwise prohibited by law": Sec. 10. It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.

The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter: *Plimpton v. Bigelow*, 93 N. Y. 593; *Van Allen v. Assessors*, 3 Wall. 573. But stockholders in a corporation have equitable rights of a pecuniary nature growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises and gains so made are distributable among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders. So, also, on the

winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders, viz., the right to dividends and the right to share in the final distribution of the corporate property, may be prejudiced by its destruction. In this case the ships were the means by which profits were to be earned, and their loss would naturally, in the ordinary course of things, diminish the capacity of the corporation to pay dividends, and consequently impair the value of the stock. The same would be true in other cases which might be mentioned, as, for example, where buildings producing rent, owned by a corporation, should be burned. It is not necessary, to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence: *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619.

The question now before us was considered by the supreme court of Iowa in the case of *Warren v. Davenport F. Ins. Co.*, 31 Iowa, 464; 7 Am. Rep. 160. The court, in a careful opinion, reached the conclusion that a stockholder in a corporation had an insurable interest in the corporate property. In *Phillips v. Knox County M. Ins. Co.*, 20 Ohio, 174, there is an adverse dictum, but the decision went on another ground. In *Wilson v. Jones*, L. R. 2 Ex. 139, the action was upon a policy in favor of the plaintiff, a share-holder in the Atlantic Telegraph Company, a company organized to lay the Atlantic cable. The court construed the contract as an insurance of the plaintiff in respect to the adventure undertaken by the company to lay the cable, and it was held that his interest as share-holder was an insurable interest, and likened it to an insurance on profits. See also *Paterson v. Harris*, 1 Best & S. 336. It is difficult to perceive any good reason why, if a stockholder could be insured on his share in a corporation against a loss happening in the prosecution of a corporate enterprise, he could not insure specifically the corporate property itself embraced in the adventure, and prove his interest by showing that he was a share-holder.

The question here is, Did the plaintiff have an insurable interest covered by the policy? The amount of damages is not in question. Except that the parties have taken that question out of the controversy, the extent of the loss would be a question of fact to be ascertained by proof, and the recovery.

up to the amount insured, would be measured by the actual loss. We are of opinion that the view that a stockholder in a corporation may insure specific corporate property, by reason of his situation as stockholder, stands upon the better reason, and also that it is in consonance with the current of authority defining insurable interests in our courts. The cases of *Herkimer v. Rice*, 27 N. Y. 163, *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451, and *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535, 60 Am. Rep. 473, sustained policies upon interests quite as remote as the interest now in question. It would be useless reiteration to restate the particular facts and grounds of the decisions in these cases. It is sufficient to refer to them, and to say, in conclusion, that it seems to us, both upon authority and reason, that the insurance now in question is not a wager policy, but is a fair and reasonable contract of indemnity founded upon a real interest, though not amounting to an estate legal or equitable in the property insured.

The judgment should therefore be affirmed.

FIRE INSURANCE — WHAT CONSTITUTES AN INSURABLE INTEREST. — As to what is an insurable interest in property, see note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 510-518. Whenever a legal connection can be shown to exist between the injury which may occur to the property insured, and the loss to the party insuring, the assured has a sufficient insurable interest: *McDonald v. Black*, 20 Ohio, 185; 55 Am. Dec. 448, and note. A qualified interest in property, or any interest which would be recognized by a court of law or equity, is an insurable interest: *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464; 7 Am. Rep. 160; *Hough v. C. F. Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581. Compare *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51. A leasehold interest is insurable: *Philadelphia T. Co. v. British etc. Assur. Co.*, 132 Pa. St. 236. A bailee, such as a warehouseman, may have an insurable interest in property in his possession for safe-keeping: *California Ins. Co. v. Union C. Co.*, 133 U. S. 387. An assignee for the benefit of creditors may insure the property assigned to him: *Sibley v. Prescott Ins. Co.*, 57 Mich. 14.

ARFF v. STAR FIRE INSURANCE COMPANY.

[125 NEW YORK, 57.]

INSURANCE — NOTICE TO AN ORDINARY INSURANCE BROKER is not notice to the insurer.

INSURANCE BROKER IS ONE WHO ACTS AS A MIDDLEMAN between the assured and the company, and who solicits insurance from the public under no employment from any special company, but having secured an order, he either places the insurance with a company selected by the assured, or in the absence of any selection by him, then with a company selected by such broker. If he enters into the exclusive employment of the insurer or his agent, he loses his character as an insurance broker, and becomes a mere clerk or employee, and any notice which could be given to a clerk or employee can be given to him.

INSURANCE — NOTICE OF ADDITIONAL INSURANCE is sufficient if given to one in the employment of an agent to whom such notice might properly have been given, where such employee solicited the original insurance, occupies a desk in the office of such agent, and his duties are to solicit insurance for the exclusive benefit of such agent, and to take to him all risks secured.

INSURANCE — WAIVER BY CLERK. — An ordinary agent of an insurance company has the power to employ clerks to discharge the ordinary business of his agency, and a waiver which the agent himself could make may be made by his clerk. The act of the clerk is the act of the agent, and, as such, binds the company. The fact that the clerk is compensated for his services by a commission does not limit his authority.

INSURANCE — CLERKS OF AGENTS. — A provision of a policy of insurance, that no one not holding a commission of the company shall be considered as its agent, does not prevent the agent's employment of the usual and necessary clerical assistants, nor does it prevent them, when employed, from exercising the powers usually incident to their position.

INSURANCE — EVIDENCE. — When it is claimed in an action on a policy of insurance that a notice of additional insurance was given to a clerk of an agent of the insurer, and that its being so given was sufficient to comply with the policy, evidence is admissible which tends to show that the agents employed clerks who were in the habit of attending to the details of the business and of signing consents for additional insurance.

Henry A. Merritt, for the appellant.

R. A. Parmenter, for the respondent.

PECKHAM, J. This is an action to recover upon a policy of insurance issued by the defendant upon certain personal property belonging to the plaintiff. A loss having occurred, and plaintiff having made a demand upon defendant for payment under the policy, the defendant refused to pay, because it appeared that other insurance had been taken subsequent to the issuing of the policy in question, and, as defendant claimed, no notice had been given to it of the taking of such insurance. There was a clause in the policy by which the

plaintiff "agreed to notify the company if, at the making of this insurance, or at any time during its continuance, there shall be any other insurance applied to the property herein described, or any part thereof, whether the same be valid or not." It was also provided that the policy should become void if the assured neglected to comply with its terms, conditions, or covenants. There was also a provision in the policy that "only such persons as shall hold the commission of this company shall be considered as its agents in any transaction relating to this insurance or any renewal thereof, or the payment of premium to the company. Any other person shall be deemed to be the agent of the assured, and payment of the premium to such person shall be at the sole risk of the assured."

The plaintiff claimed upon the trial that he had given the notice required by the company. He had in fact given it to one Werner Strecker, and whether or not that notice is sufficient is the only question in the case.

The plaintiff was nonsuited on the ground that he had not given the notice as required by the policy; and that judgment of nonsuit has been affirmed by the general term, and the plaintiff appeals here.

It appeared in evidence that Macdonald and Van Alstyne were the duly commissioned agents of the company in the city of Troy at the time when this policy was issued. Mr. Van Alstyne swore that his firm had authority, as agents of the defendant, to give permits for additional insurance, and to consent to assignments for transfers of insurance. He also stated that their authority as agents of the defendant was to do a general insurance business for the company, collect premiums, give receipts and consents and indorsements on insurance policies. They had been agents of the defendant for five or six years at the time in question. When this policy was issued, and up to the time of the occurrence of the loss, this firm had been doing business in the city of Troy for the defendant as general insurance agents, and during that time Mr. Van Alstyne said that they "had in their employ, among others, this Werner Strecker," and he designated the manner of his employment as "working for us as a broker; I mean soliciting insurance on commission; he was soliciting insurance for our firm, and our firm only, on a commission; his compensation was regulated by certain commission on business he brought. He did not do other fire insurance that I

know of; what he would do would be to go and solicit insurance, and bring it to our office; if we approved it, we would take it and pay him his commission; that was all. He was not soliciting fire insurance for any one else. His arrangement about his working for us in the way of fire insurance was, that he was employed by us to solicit insurance for our office exclusively, upon which we paid him a commission upon the business he brought in." He also said that Strecker had a desk in their office during this time, "not one of his own, but he used one that was in the office, the same as any person; when he happened in, he came in and used a desk there the same as any broker; he had a desk that he used pretty much all the time for himself."

Mr. Strecker himself testified that he was "in the insurance business, principally, in 1884; fire and life both; working for Macdonald and Van Alstyne, and for no one else not in fire insurance; I was paid according to the business I brought in; if I did a great deal of business I got a great deal of money, and if I did n't, I got less; during that year, I do not know whether it could be called working under a salary or not; it was always regulated by the amount of business; there was a desk in the office I usually occupied; the nature of my employment was soliciting."

He solicited from Mr. Arff an application for the policy in question, and it was after the issuing of the policy that the plaintiff informed Mr. Strecker that other insurance had been taken through Mr. Fromann.

It was also stated by Mr. Van Alstyne that, under their agreement with Mr. Strecker, "he was at liberty to work for any other insurance company, if he pleased; he could place his business with other insurance companies, if he chose; he could place such business as he solicited with other companies, if he chose, with other agents; he had, for some considerable period anterior to 1884, acted for us in the matter of soliciting fire insurance; his office was located with us; he had a desk in our office; prior to this, he had been in our employ since 1880, doing business exclusively for our company, and having a desk in our office during that time."

There was thus evidence from which the jury could infer that Mr. Strecker was solely in the employ of these agents, and that the kind of employment in which he was engaged was the soliciting for them of policies of insurance, and for them exclusively, and that his compensation for the services per-

formed by him for them depended upon the amount of business which he was able to do; or in other words, the number of applications which he secured for them and which they accepted. It is true that Mr. Van Alstyne denominated this kind of service as the service of a broker, and he also stated that Mr. Strecker was at liberty to work for any other insurance company, if he pleased. If he meant that Mr. Strecker had the power to violate his agreement with them, and instead of working exclusively for them, work for others, why, that is a self-evident proposition, and has no bearing upon the question as to the capacity in which he was then employed by them. If he meant to assert that he was not exclusively employed by them, then it is a contradiction of what the witness had already several times stated to be the truth, and also a contradiction of the testimony of Mr. Strecker himself, and the fact of exclusive employment, if material, should have been left to the jury to determine. If the witness Strecker were really nothing but an ordinary insurance broker, notice to him of subsequent insurance would not be notice to the company: *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Devens v. Mechanics' etc. Ins. Co.*, 83 N. Y. 168.

What is understood under the designation of an insurance broker is, one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company, but having secured an order, he either places the insurance with the company selected by the insurer, or in the absence of any selection by him, then with the company selected by such broker. Ordinarily, the relation between the insured and the broker is that between the principal and his agent, and, according to 1 Arnould on Insurance, 2d ed., c. 5, p. 108, "the business of a policy broker would seem to be limited to receiving instructions from his principal as to the nature of the risk and the rate of premium at which he wishes to insure, communicating these facts to the underwriters, effecting the policy with them on the best possible terms for his employer, paying them the premium, and receiving from them whatever may be due in case of loss."

In the two cases, above cited, of *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609, and *Devens v. Mechanics' etc. Ins. Co.*, 83 N. Y. 168, it appeared that the broker who effected the insurance in either case was not in the employment of the insuring company at all, and that the only connection between the company

and him was, that when he presented to them an application for insurance, if the company chose to issue a policy, he was paid a commission thereon by the company. In each of those cases the man procuring the insurance was not confined to any company in his labors; he was in no sense in the employment of any company, and the nature of his connection was such that upon receipt of the premium by the company and the delivery of the policy to the insured, his connection with the company wholly ceased.

The connection in this case between this assumed broker and his principals is entirely different. Assuming the truth of the statement that he was in the exclusive employment of these agents, and that it was his duty in such case to bring whatever applications he received to the agents, because of his agreement with them that he should work for them exclusively, it would seem that his character as an ordinary insurance broker had ceased from the time that he entered into such employment. However these agents might characterize his employment, the fact upon the testimony in the case, assuming its truth as above construed, leaves him, in my opinion, nothing more or less than a clerk or employee of these agents. He performs the same duties that would be performed by an individual employed as a clerk, and told to do this business. The mere solicitation of insurance and the bringing of the application to these agents, who are to determine finally whether it shall or shall not be accepted, is not of such a nature that it could not be done by an ordinary clerk, nor does the doing of it in that way and under such circumstances necessarily preclude the person who does it from occupying the position of clerk, and place him in the position of an ordinary insurance broker. If upon these facts he acted as clerk, and the oral notice were given to him in his capacity of clerk of these agents, such notice would be sufficient: *McEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill, 101; approved in *Wilson v. Genesee Mut. Ins. Co.*, 14 N. Y. 413, at 421.

It has been held that an ordinary agent of an insurance company has the power to employ clerks to discharge the ordinary business of his agency, and that a waiver of a character which the agent himself could make is to be attributed to him when made by his clerk. In *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566, it was said by Earl, commissioner, at page 123: "We know, according to the ordinary

course of business, that insurance agents frequently have clerks to assist them; and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payments of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *Delegatus non potest delegare* does not apply in such a case: Story on Agency, sec. 14."

In the case of *Clark v. Glens Falls Ins. Co.*, 21 N. Y. Dig. 197, the general term of the supreme court held that the policy in that suit, countersigned by a clerk in the office of the authorized and commissioned agent of the defendant, was a proper and valid policy, where the clerk was authorized by the agent to contract new insurance and to give renewals, to make monthly and daily reports, and collect premiums on policies and renewals issued.

In *Chase v. People's Fire Ins. Co.*, 14 Hun, 456, it was held that the knowledge of a clerk of the agents of defendant's company that the house insured was vacant was the knowledge of the agents of the company, and therefore the knowledge of the company itself. And in *Kuney v. Amazon Ins. Co.*, 36 Hun, 66, the supreme court, in the fifth department, held that a general agent of a foreign insurance company had a right, by virtue of its authority and for the purpose of discharging the duties appertaining to his office, to employ all necessary agents, clerks, and surveyors to enable him to conduct the business with correctness, intelligence, and promptness, and that when he did in fact employ others, their acts and contracts would be binding upon the company the same as if made personally by Miller, the general agent.

Enough has been said to show that an agent of an insurance company has the right to, and indeed it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. Soliciting insurance is part of the business of such agents, and it is not to be assumed that such solicitation can be made only by the agents personally, nor can it be held as matter of

law that when it is made by some person employed exclusively by them that such solicitation, on the part of the person thus employed, makes him an insurance broker and takes away from him his character as clerk or employee of the agent. The fact that Strecker was compensated for his services to these agents by a commission on the business which he brought in is not conclusive upon the question of the capacity in which he worked. Clerks or other employees are frequently compensated by a commission upon the amount of business brought to the employer by them. In order to constitute Strecker such an employee that he might receive notice for his employers as to subsequent insurance in a case like this, it is not necessary that he should have been engaged to perform only such duties as may be and are done in the office of his employer. The place of the performance of the duties is neither the sole nor always a necessary criterion by which to judge of the nature of such service. The employee of the agent in the case of *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566, was not confined to the office in the performance of duties which he discharged for his employer.

There is, moreover, in the evidence of one of the agents sufficient for a jury to infer that Strecker had a desk in their office, and belonging to them, assigned to him for his personal use while at the office in the discharge of his duties pertaining to his employment by them, and that it was his habit to so use the desk, which was regarded as his for such purpose. But upon the question of the character of the service we think it is sufficient that the person is engaged by the agent to do for him some portion of the ordinary, usual, and well-known duties pertaining to the position of the agent, and what he does in the course of that employment and within its general scope is done by the agent. The notice which he receives while in the performance of his duties, and which relate to the subject-matter thereof, must be regarded in the same light as and equivalent to a notice to the agent.

The proof in the case is susceptible of the inference that Strecker was employed exclusively by the agents of defendant, and to perform for them that which is part of the ordinary and usual business of an agent of an insurance company, viz., to solicit business. If the agents refused to accept the particular application, Strecker had nevertheless done all that he was employed to do by bringing it to them. By his agreement, their refusal did not authorize him to solicit some other

agent or company to take the risk. At least this construction can be given to some of the evidence on the part of the plaintiff. In truth, in one view of the evidence, Strecker was not a middleman at all; he did not act as such in this case; what he did was done by him from the very first in the interest of and for these particular agents.

Nor does the provision in the policy that no one not holding the commission of the company shall be considered as its agent prevent the agent's employment of the usual, and indeed necessary, clerical and other assistants, in order to enable them to properly perform their duties as commissioned agents of the company. And when thus employed, the ordinary rules of law are applicable to their acts and positions. We think that if Strecker were exclusively employed by the agents, and that his duties could only be honestly discharged while the agreement between them lasted, by giving his entire service in that line to the agents of the defendant, and if he were thus employed at the time that he procured this application and received this notice, that the defendant is bound by such notice the same as if it had been given in person to their agents.

If, on the contrary, according to some possible construction of the evidence of one of the agents, the employment were not exclusive, and he was occupying really the position of a simple insurance broker, then the notice was not sufficient. There were many questions put to the agent when he was on the stand, the purpose of which was to show (what may be inferred from the nature of the business) that the agents employed clerks.

Counsel for the plaintiff also asked the witness whether clerks in his employ did not frequently and generally sign consents for other and additional insurance in respect to this company; whether it had been the habit of this firm of agents to attend to the details of the business; and how many clerks the firm had at this time. All these questions were objected to, and ruled out by the court below. We think they were proper for the purpose of showing the manner in which the business of this firm was conducted, although perhaps the court might assume or take judicial notice of the fact that agents of an insurance company do business largely through clerks and subagents, and that many of the details of their business are not performed by themselves. We should not, perhaps, in this instance reverse the judgment for the refusal to admit

this evidence; but we think its admission would not have been error.

Upon the whole, we think the learned judge erred in nonsuited the plaintiff, and that the judgment entered upon the nonsuit must be reversed, and a new trial granted, with costs to abide the event.

AGENCY—NOTICE TO AGENT.—As to when notice to an agent is notice to the principal, see *Johnston H. Co. v. Miller*, 72 Mich. 265; 16 Am. St. Rep. 536, and note. The general rule is, that notice to an agent is notice to his principal: *Wood v. Rayburn*, 18 Or. 3; *Van Dusen v. Leclercq*, 78 Mich. 492. As to when an insurance company is bound by notice to its agent, see *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233. But notice to an agent is not always imputed to his principal: *Allen v. South Boston R. R. Co.*, 159 Mass. 209; 15 Am. St. Rep. 185, and note. In *Atchison etc. R. R. Co. v. Benton*, 42 Kan. 698, it was decided that notice to the general attorney of a railroad company, relating to matters not connected with his department, is not notice to the company.

AGENCY—SUBAGENT.—An agent may appoint a subagent to do the acts in the course of the agency which do not call for the exercise of judgment or discretion, and the principal is bound as much by the acts of such subagent as by the acts of the agent himself: *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178, and note. This principle is applied to clerks or subagents of insurance agents: *Deitz v. Providence etc. Ins. Co.*, 33 W. Va. 526.

AGENCY—INSURANCE.—As to what is necessary to constitute one the agent of an insurance company, see *State Ins. Co. v. Taylor*, 14 Col. 499; 20 Am. St. Rep. 281, and note; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 19 Am. St. Rep. 326, and note; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411; 53 Am. Rep. 197, and note 200-202.

WHEELER v. OCEANIC STEAM NAVIGATION CO.

[125 NEW YORK, 156.]

CARRIER'S LIABILITY FOR PICTURES AND OTHER ARTICLES.—Section 4281 of the Revised Statutes of the United States, providing that if any shipper of certain articles, among which are included pictures, shall load the same as freight or baggage on any vessel, without giving notice of their true character and value, and having the same entered on a bill of lading, the master or owner of such vessel shall not be liable as carrier thereof, in any form or manner, does not relieve the vessel or its owners from all liability for a package of portraits contained in a box received by the vessel for transportation, without any notice being given of its character or value. The statute merely relieves the vessel and its owners as common carriers, without abridging their liability as bailees.

CARRIERS—EVIDENCE OF NEGLIGENCE.—NON-DELIVERY at port of destination is presumptive evidence of negligence.

ACTION to recover damages for negligence of defendant in not delivering to plaintiff a box containing pictures which was

shipped in one of defendant's vessels. The trial court gave judgment in favor of defendant, which was affirmed by the general term on appeal.

Boudinot Keith, for the appellant.

Lawrence Godkin, for the respondent.

FINCH, J. Section 4281 of the Revised Statutes of the United States provides, in substance, that if any shipper of certain articles which are specifically named, and among which are "pictures," shall lade the same as freight or baggage on any vessel without at the time giving notice to its owner, master, or agent of the true character and value of the property shipped, and having the same entered upon the bill of lading, "the master and owner of such ship or vessel shall not be liable as carriers thereof in any form or manner." The protection of this statute has been successfully invoked by the defendant company against the loss which forms the subject of this action.

Dora Wheeler, the plaintiff, and described in the evidence as an artist of established reputation, returning home from a foreign journey, took passage on the steamer *Germanic*, and, in addition to her ordinary baggage, delivered to the ship for transportation a package of valuable portraits which she had painted while abroad. These were contained in a box of white wood, with iron hinges and corner-clasps, and closed by a lock. The package itself, besides the address, was marked "Studio," and its appearance unmistakably indicated something other than and different from the ordinary baggage of a traveler. There was no attempt to deceive the defendant as to its true character, or by artifice or misrepresentation to make it appear to be personal baggage, or shield it, as such, from proper freight charges. Nevertheless, it was not entered upon the bill of lading with notice of its character and value, or in any manner whatever, but was put in the hold of the vessel for transportation to New York. The voyage was unattended by either accident or delay, and it is reasonably certain that the package came in the ship to its port of destination. Arrived at its wharf, the trunks and packages of the passengers were landed upon the dock, each individual being left to find and collect together his own. The package in question was never delivered to its owner, but was probably misdelivered, or permitted to be taken by one having no right to receive it. For the damage thus sustained the plaintiff

brought this action, and has been defeated upon a construction of the statute which is challenged by this appeal.

That construction is a very broad one. It denies liability "in any form or manner." It relieves the ship-owner from all responsibility, where the baggage or goods have not been entered upon the manifest. It involves a ruling that he may accept the property for transportation, and yet owe no duty, even of the slightest care, to its owner, who finds that he has put his baggage in a lottery, and must take the chances of its restoration. The goods may be delivered to the wrong person through gross carelessness, or be ruined by inexcusable negligence, or even stolen or converted by the crew, and yet the ship-owner is not liable "in any form or manner"; and such, it is claimed, is both the language and purport of the statute. Its provisions meet the shipper at the port of destination, and place him at the mercy of the owner or master of the vessel. If the property is restored, it is through the grace of those in command; if it is not delivered, they are not liable for its loss, "in any form or manner." Such construction goes far beyond the due protection of those engaged in the transportation of property, and, instead of merely moderating or lessening their liability, sweeps it all away, and leaves the baggage and property of the passenger protected by no duty and guarded by no liability. It is quite true that, even upon this construction, the courts would hesitate and halt before a proven theft or an actual conversion, on the ground that the fact and opportunity of transportation did not change the nature or character of such positive wrongs; but there would still remain a gap to be spanned between the actual wrong-doer and the defendant company, and, when safely crossed, as it well might be, the relief would be of little value, since, ordinarily, the shipper can neither know nor prove the cause of the loss, especially where motive exists for its concealment. If, therefore, the statute admits of a more just construction, and one which, while giving needed protection to the ship-owner, preserves some reasonable duty to the shipper or to the passenger, I think we should not hesitate to adopt it.

The construction which has prevailed eliminates from the statute the words "as carrier thereof," and gives them no force or meaning. They become wholly superfluous. To us they appear to be vital to the true interpretation. The liability of the carrier as such was well understood by the framers of the statute. It had long been settled, so that no one could

mistake it. By force of his public employment, he became an insurer of the property intrusted to his care, and liable for its loss, irrespective of the cause, unless from the act of God or the public enemy. But involved in this greater liability, and absorbed by it, was a lesser liability as bailee for hire; of no consequence while the greater liability existed, but surviving the destruction of that, so that when the carrier ceased to be liable as carrier, he yet remained liable as bailee. In *Dorr v. New Jersey Steam Nav. Co.*, 4 Sand. 145, the doctrine was thus expressed: "A common carrier has in truth two distinct liabilities; the one for losses by accident or mistake, where he is liable by the custom of the realm or the common law as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee"; and the language was cited by the federal court in *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 363, and the doctrine approved in *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 62 Am. Dec. 125, where it was held that the carrier might by special agreement strip himself of that character, and so become, as to the particular transaction, an ordinary bailee and private carrier for hire. In *Lamb v. Camden & A. R. R. & T. Co.*, 46 N. Y. 278, 7 Am. Rep. 327, Grover, J., said: "In considering this question, it must be borne in mind that it has already been determined that the defendant was exonerated from all liability as carrier for a loss caused by the destruction of the cotton by fire, by an express provision of the contract in pursuance of which it transported the cotton. Relieved of this responsibility, it was liable only, in case it was destroyed, as bailee for hire; and it is undisputed that such a bailee is liable for the loss of the property only in cases where the loss is the result of his negligence." These cases show that the liability for negligence as bailee survives even when by special contract the carrier has thrown off his liability as such; and the courts of this state have exhibited a very decided purpose to retain and enforce that liability wherever it is possible. Even that may be thrown off by force of a special agreement; but we have refused to permit any general words to accomplish such result, and have insisted that where the carrier seeks to contract against the consequences of his own negligence, he must say so openly and plainly, so as not to be in the slightest degree misunderstood, and is not at liberty to hide the stipulation away under any form of words, however broad or formidable. *Nicholas v. New York Cent. & H. R. R. Co.*, 89 N. Y. 372.

But what the carrier and his customer might accomplish by special agreement, Congress could effect by statute, in the absence of such agreement, but must necessarily leave the lesser liability of bailee unaffected, if it merely removes the liability as carrier, and does not, by clear and definite language, indicate its purpose to go further. So much, and no more than that, the section under consideration accomplished, for it distinctly removes the liability as carrier without touching that as bailee. We are bound to assume that the word "carrier" was used in its recognized legal sense, and not in some loose or careless and merely colloquial way; and that, especially, because it occurs in connection with the idea of liability, and the phrase "liable as carrier" can only mean the liability attached by law to that public employment.

Nor is this construction affected by the added words, "in any form or manner." They are not used disjunctively, and so as to constitute a separate command, but qualify the expression, "shall not be liable as carrier thereof," the full force of the words being, that the liability as carrier shall not exist in any form of action or through any manner of procedure. In *Atlantic Mut. Ins. Co. v. McLoon*, 48 Barb. 28, it was held that the carrier's liability assumed two different forms, and that he might be proceeded against either in tort for a violation of his public duty, or on contract for a breach of his implied agreement to carry and deliver safely. And so the statute deemed it prudent, in relieving the carrier from liability, to add "in any form or manner"; that is, by any form or mode of action or proceeding whatever.

We are further referred to the case of *Hinton v. Dibbin*, 2 Ad. & E., N. S., 646, in which it was held, under a similar statute (1 Wm. IV., c. 68), that the carrier could not be held liable even for gross negligence; but that decision was founded upon an enactment from which the words "liable as carrier" were conspicuously absent. That act freed the ship-owner from any liability for the loss; and even under such provision, where the property was not lost, but merely delayed in its transit, damages for the consequent injury resulting from negligence could probably be recovered.

It follows that the nonsuit in this case was erroneous. The plaintiff, in her complaint, alleged negligence, and the facts which she proved *prima facie* established it. The non-delivery at the port of destination is presumptive evidence of such negligence: *Canfield v. Baltimore etc. R. R. Co.*, 93 N. Y. 538:

45 Am. Rep. 268. In addition, it was shown that the vessel stopped nowhere until the port of destination was reached, and then the baggage was placed upon the dock with little of order or control, and leaving the passengers to find their own in the consequent confusion. And so a case was made which should have gone to the jury.

A possible criticism upon this view of the statute is quite likely at this point to suggest itself. One may inquire of what value to the ship-owner is the enactment, when, after all, he is left liable for the loss, and responsible, whether the property is entered upon the ship's manifest or not. The inquiry goes to the root of the matter, and its answer will further test the justice and propriety of our interpretation. Under it, I think the ship-owner is protected as far as he should be, and in two very important respects.

1. The statute leaves him at liberty to refuse to carry the property at all, unless its value and character are disclosed and entered upon the ship's manifest. The law makes him master of the situation, and able, if he shall please, to enforce obedience to it. As carrier, he could not refuse, but since he does not become such unless the proper entry is made, he may refuse until then to transport the property at all. As a simple bailee, he may take the property or decline it. If, now, he chooses to take it in that character, the act is voluntary; there is no compulsion about it; and on what principle shall we say that because he so takes it he shall be absolved from all care over it, at liberty to be as negligent as he pleases, and the only bailee in the world having that lawless control?

2. If a loss occurs, he is no longer liable as an insurer. The door to a just defense is opened before him, and the burden of proof to establish negligence is shifted to his adversary. If the ship-owner has in truth exercised due care, he may show it, and go discharged. If he has not exercised it, if he has been negligent and careless, he ought to respond in damages, and must do so.

It was suggested by the general term, in aid of their construction, that one reason for the enactment was the interest which the government had in procuring entries upon the vessel's manifest of all property shipped. If that be true, the construction of the courts below tends very distinctly to defeat such purpose; for, while it assumes it to be for the interest of the passenger to enter his baggage or parcel upon the bills of lading, it leaves him liable to pay possible charges for freight,

and so makes his action doubtful; while, on the other hand, it becomes at once the strong and paramount interest of the ship-owner and master to keep all baggage and property carried as such off of the ship's manifest so far as possible, since, if it goes on, they become liable as insurers; but if it does not, they incur no responsibility, not even that of private bailees. Passengers are little likely to be versed in the shipping laws; owners are sure to be; and the traveler who sought to put his baggage upon the manifest might find it no easy matter to accomplish against the will of ship-owners and officers. In the haste and confusion of departure they could easily postpone or avoid attention to the subject, or repel the passenger with the insolence of command. All baggage and parcels for which no separate freight was to be charged would be kept off of the manifest, so far as owners and officers could effect that result.

It may be that Congress might go as far as the English statute appears to have gone, but our judgment is, that it has neither done so nor intended to do so, and that it has stopped short of a rule which would protect master and ship-owner from the consequences of their own negligence. That, the federal court has held, is against public policy, and presumably it would not encourage a construction in such direction where any other was permissible. It follows that the plaintiff was erroneously defeated, and should have an opportunity to present her case to a jury.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CARRIERS OF GOODS. — *Prima facie*, a carrier is liable for goods upon proof of delivery and acceptance for carriage, and of loss or damage in carrying: *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722; for delivery of the goods at the point of destination in good condition is necessary to relieve the carrier from liability as such: *Scheu v. Benedict*, 116 N.Y. 510; 15 Am. St. Rep. 426. Non-delivery by the carrier is *prima facie* evidence of a want of ordinary care, and casts upon him the burden of proof: *Shenk v. Philadelphia S. P. Co.*, 60 Pa. St. 109; 100 Am. Dec. 541; *Tardoe v. Ship Toulon*, 14 La. Ann. 429; 74 Am. Dec. 435.

PURDY v. ROME, WATERTOWN, AND OGDENSBURG
RAILROAD COMPANY.

[126 NEW YORK, 209.]

EMPLOYEE'S AGREEMENT THAT HE WILL NOT HOLD HIS EMPLOYER LIABLE for damages resulting from the negligence of the latter, or his servants or agents, is without consideration, and void, when the former was already in the latter's employment, and there was no new employment tendered to or accepted by him, and no promise to continue to employ him after the execution of the agreement.

Edmund B. Wynn, for the appellant.

George S. Klock, for the respondent.

PECKHAM, J. After a careful consideration of all the evidence in this case, we are brought to the conclusion that there was sufficient to go to the jury upon the two questions of the negligence of the defendant and the freedom of the plaintiff from any contributory negligence.

There is one other point made by the defendant which arises upon the so-called release put in evidence by it, and in which the plaintiff agrees and covenants that the company shall in no case be liable for any damage to the person or property of the plaintiff by reason of its own negligence or that of its agents or servants.

The plaintiff had been in the employment of the defendant for a number of years prior to the execution of the paper. At that particular time he was engaged in performing the duties of a baggage-man on a passenger train. It does not appear that he was, when first employed, engaged for any particular time, nor for any particular service. It was a general employment, and he was subject to the orders of the company. He was working for it as a baggage-man in 1879, and continued as such up to and after the execution of the paper, in August, 1881. The assistant superintendent of the defendant (who was the man that procured the execution of the paper) said "there was no compulsion about signing the contract, nor any new consideration for it. He simply signed the contract, and the defendant kept on employing the plaintiff as a baggage-man"; in other words, continued the already existing employment. The plaintiff says he went up to the office of the superintendent, in Watertown, and left his train in the depot waiting for his return. He was gone but a few moments, and went to the office in obedience to a letter he had received, and when he went into the office he said to the assistant superin-

tendent: "I came up to sign that paper." The plaintiff says he did not read it, but signed it at once, and went back to his train. The paper reads as follows:—

"Whereas, the Rome, Watertown, and Ogdensburg Railroad Company have employed J. R. Purdy in the capacity of general servant at a stipulated rate for his services, —

"Now, therefore, in consideration of such employment and the compensation agreed to be paid therefor, the said J. R. Purdy hereby covenants and agrees that in no case shall the said railroad company be liable to the said J. R. Purdy for any damage or injury to the person or property of the said J. R. Purdy by reason of the negligence of the said railroad company, its agents, servants, or employees, and that the said J. R. Purdy accepts such employment with full knowledge and notice of all the risks involved therein."

Upon this evidence, we think that there was no consideration for the execution of the paper by the plaintiff. He was already in the defendant's employment; no new employment was tendered to or accepted by him, and there was no promise that the employment he was already engaged in should continue after the execution of the paper for one moment of time, nor was its execution made a condition of the continued employment of the plaintiff. It constituted a simple gratuity on the part of the plaintiff to the defendant, relieving it from a liability or responsibility which then existed in favor of plaintiff, and in obtaining which the defendant surrendered and promised nothing. The plaintiff was in precisely the same position he was prior to its execution, excepting he had given up to the defendant all claim upon it which he otherwise might have by law, and he had received not one particle of consideration for such surrender of his legal rights.

We think the paper was void for lack of consideration.

In thus deciding, we do not intimate that if the defendant had given some kind of a consideration for the paper, it would have been valid.

It might even then be urged that public policy forbids the exaction of such a contract from its employees by railroad and other corporations, and upon that question we desire to express no opinion at the present time.

The judgment is right, and should be affirmed, with costs.

the latter, in consideration of his employment, releases and discharges the former from all liability for damages for injury or death of the servant resulting from the master's negligence, is void, as being against public policy: *Note to Harmon v. Salmon Falls Mfg. Co.*, 58 Am. Dec. 723; *Railway Co. v. Spangle*, 44 Ohio St. 471; 58 Am. Rep. 833, and particularly note 836-838; *Kansas P. E'y Co. v. Peavey*, 29 Kan. 169; 44 Am. Rep. 630, and note 633, 634.

LEADBETTER v. LEADBETTER.

[125 NEW YORK, 290.]

EXECUTION, PROPERTY SUBJECT TO. — AFTER THE DEFAULT OF A MORTGAGOR OF CHATTELS, he has no interest in the mortgaged property subject to execution against him.

Z. S. Sampson, for the appellant.

Joseph S. Bosworth, for the respondents.

O'BRIEN, J. The order from which this appeal is taken determined the right of two claimants to a certain fund which both claimed to be entitled to. The party who succeeded in the courts below is the receiver of the defendant, and the other claimant, who failed and brings this appeal, is a judgment creditor of the defendant.

The undisputed facts upon which the question arises are these: The defendant is a corporation organized under the limited liability act. In proceedings in this action to dissolve it, by reason of insolvency, the respondent William G. Shailer was appointed receiver on the 28th of October, 1889. Previous to this, and on the thirteenth day of February, 1889, the defendant duly executed and delivered and procured to be filed in the proper office a chattel mortgage on the corporate property for three thousand dollars, to secure the payment of its notes to that amount for money borrowed. The condition of the mortgage was, that the defendant should pay the notes as they became due, and that in case of default in the payment of the notes, or any of them, when due, or in case the mortgagor, before the notes, or any of them, became due, should remove any of the goods or suffer any attachment or other process against property to be issued against it, or any judgment to be entered against it, then the said sum of three thousand dollars should become instantly due, and the mortgagee or his assigns should have the right to take possession of the goods and carry them away, and sell the same for the best attainable price, on five days' notice to the mortgagor,

and from the proceeds pay the amount unpaid on the notes, and render the sum remaining to the mortgagor or his assigns. Some of the notes, to secure which the mortgage was given, were paid. Before the receiver was appointed, two of the notes became due and remained unpaid, one on the 10th of August, 1889, and another on the 10th of October, 1889.

On the 25th of October, 1889, William E. Hardy, who brings this appeal, recovered a judgment against the defendant for \$4,828.42, and on the same day procured execution to be issued thereon and a levy to be made on the property covered by the mortgage. This levy was made, as will be seen by the dates, three days before the receiver was appointed. On his appointment there were three parties claiming the property, namely, the holder of the chattel mortgage and the unpaid notes to secure the payment of which it was given, Hardy, the judgment creditor, and the receiver. In this condition of affairs, an order was entered in the action to dissolve, upon the consent of the receiver, the mortgagee, and the judgment creditor, the plaintiff's attorney in the suit not objecting; that the property be sold by the receiver, and that "the proceeds arising from such sale or sales be substituted for and take the place of the property sold, and be subject to the same liens as existed against the property, and the rights of all the parties remain in full force and effect as they were at the time of the sale." This order also, upon the same consents, appointed a referee "to hear and determine the rights, liens, and priority of claims to said property or proceeds," the expenses of the sale to be paid first from such proceeds, and the balance to be paid over on the coming in and confirmation of the referee's report as therein provided. The referee found that the net proceeds of the sale, after paying expenses, was \$4,107.83; that the amount due on the notes secured by the mortgage was \$2,000, and interest thereon from February 7, 1889; that out of the net proceeds of sale there should be paid first to the holder of the notes and mortgage the amount so found due; that as there was default in the payment of the mortgage when the levy was made by the judgment creditor, both by reason of the non-payment of the notes and the entry of the judgment, the mortgagor had no legal interest in the property; and that the receiver was entitled to the balance remaining after payment of the mortgage. The report was confirmed by the court, and the order entered thereon affirmed on appeal by the general term.

We think that the appeal of the judgment creditor cannot be sustained. Though he made the levy three days before the receiver was appointed, yet he took nothing by it for the reason that the defendant in the execution had no interest upon which the lien of the execution could attach. The law seems to be settled in this state that after default the mortgagor has no interest in the mortgaged property that can be sold on execution against him: *Hull v. Carnley*, 11 N. Y. 502; *Hall v. Sampson*, 35 N. Y. 274; 91 Am. Dec. 56; *Galen v. Brown*, 22 N. Y. 37; *Manchester v. Tibbetts*, 121 N. Y. 223; 18 Am. St. Rep. 816. The event had happened that made the mortgage instantly due, and there was no right of possession in the mortgagor when the levy was made. The condition in the mortgage in regard to notice applies only to the time and place of the sale under the mortgage, and the notice was not necessary in order to perfect the default.

The order should be affirmed, with costs.

EXECUTION, PROPERTY SUBJECT TO. — After default, the mortgagor of chattels has no interest in the mortgaged property subject to an execution issued against him: *Manchester v. Tibbetts*, 121 N. Y. 219; 18 Am. St. Rep. 816, and note.

MCKEE v. DELAWARE AND HUDSON CANAL CO.

[125 NEW YORK, 358.]

RIPIARIAN OWNER HAS NO RIGHT TO RETAIN BY MEANS OF A DAM THE WATERS of a natural stream running through his land, and then to discharge them in such quantities into such stream that it is insufficient to carry them, and they therefore overflow the lands of a riparian proprietor below, to his injury.

DAMAGES. — **ABSENCE OF MALICE** on the part of defendant and his agents will not relieve him from liability for damages occasioned by his or their wrongful acts.

Thornton A. Niven, for the appellant.

T. F. Bush, for the respondent.

O'BRIEN, J. This was an action of an equitable character to restrain the defendant from discharging water upon the plaintiff's land through the means of a dam or reservoir constructed to store water for the use of its canal. The case was tried by the court with the aid of a jury. The plaintiff recovered damages, and the equitable relief claimed was granted, and the general term has sustained the decision. The judg-

ment rests on the following facts, found by the trial court: In the year 1851 the plaintiff became the owner and went into the possession of the farm, for the alleged injury to which the damages were recovered. It embraced some thirty or forty acres of low, flat land through which flowed a stream or small brook, about six inches deep and from three to six feet wide. The land on both sides of the stream was marshy, and the plaintiff straightened the course of the stream and made it somewhat wider and deeper, and then by a system of drainage through the flat land and into the stream thus enlarged, the land was reclaimed and became valuable for agricultural purposes. After the land became so improved, the defendant, in the year 1871, constructed its dam and reservoir across this stream on its own land, at a point above the lands of the plaintiff. This dam was used for the purpose of retaining and holding back the water in dry seasons, from which it was discharged through the stream on plaintiff's land into the Neversink River, and from thence into defendant's canal below. The defendant in fact used the brook that ran through the plaintiff's farm as a feeder, through which water was discharged from the dam above into the canal. At certain seasons of the year, during the period of canal navigation, the defendant discharged the water in much larger quantities than would otherwise naturally flow in the stream, and to such an extent that its banks were overflowed, and the ditches constructed by plaintiff to drain the land filled and rendered useless, and the flat land submerged and rendered untillable, and the crops thereon destroyed. To prevent these injuries to plaintiff's land, a perpetual injunction was granted against the use of the stream as a feeder for the canal to discharge water through it in quantities greater than would naturally flow therein.

It was not claimed that the injuries were caused by any want of skill or negligence on defendant's part in the construction of the dam or reservoir, but to the fact that more water was discharged by defendant into the stream than it was capable of carrying off without overflowing the adjoining lands. The defendant had never acquired the right to use this stream for the purpose of conducting water to the canal, by condemnation proceedings or otherwise. The discharge by the defendant of water upon plaintiff's land in the manner found was an injury in the nature of a trespass, for which the plaintiff was entitled to recover his damages, and to restrain in the future by injunction. It is the case of a riparian owner above who has

detained or stored the water of a natural stream, and then discharged it into the stream in such quantities as to overflow the lands and injure the riparian proprietor below. Cases are cited by the defendant, to the effect that where a dam is constructed by legislative authority, the party constructing it is not liable for damages caused by overflow or percolation in its use. That principle has no application to this case. If the plaintiff's land had been damaged by water which percolated or accidentally escaped from this dam without any neglect or fault on the part of the defendant, then these cases would probably apply. But here the defendant intentionally pours water upon the land of an adjoining owner, because the water is discharged into a stream running through his land in such quantities that the channel of the stream cannot carry it away. If it should open its canal at some point, and intentionally overflow adjoining land, causing damage, it would be no answer to a suit by the owner to show that the canal at this point was well and skillfully constructed, and that it was authorized by the legislature. It is quite true that the defendant's agents are not moved by any malice toward the plaintiff or any actual intention to injure him, but still, they perform acts that have that result. In such cases an action will lie at the suit of the injured party: *St. Peters v. Denison*, 58 N. Y. 416; *Noonan v. City of Albany*, 79 N. Y. 470; 35 Am. Rep. 540; *Sipple v. State*, 99 N. Y. 284; *Vernum v. Wheeler*, 35 Hun, 53; *Scriven v. Smith*, 100 N. Y. 471; 53 Am. Rep. 224; *Silsby Mfg. Co. v. State*, 104 N. Y. 562.

The special provision for assessing damages in such cases contained in the defendant's charter (Laws of 1823, c. 238, sec. 10) does not deprive the plaintiff of the remedy by suit at law or in equity.

The judgment should be affirmed, with costs.

RIPARIAN RIGHTS — ERECTION OF DAM — OVERFLOWING LANDS BELOW. — A riparian owner cannot erect a dam and then discharge a superabundance of water upon the lands of lower land-owners: Note to *McCoy v. Danley*, 57 Am. Dec. 686. Compare *Witherall v. Muskegon B. Co.*, 68 Mich. 48; 18 Am. St. Rep. 325, and note; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396. But in *Brooks v. Cedar Brook etc. Co.*, 82 Me. 17, 17 Am. St. Rep. 459, it is decided that the injuries suffered by one, through the lawful erection of a dam under legislative authority, whereby the flow of water in a stream running through his land is at times increased, causing the soil to be somewhat worn away, are consequential, and do not entitle him to any redress. See also *Grant v. Kuglar*, 81 Ga. 637, 12 Am. St. Rep. 348, where the upper proprietor was held liable for injury caused to the land of the lower owner by reason of the removal by the former of a natural ledge of rock in the bed of a stream flowing through the lands of both proprietors.

GREENE v. GREENE.

[135 NEW YORK, 506.]

WILLS. — IN THE INTERPRETATION OF WILLS, THE INTENTION of the testator, if discoverable and lawful, must be effected.

WHERE THERE IS A DEVISE OF PROPERTY IN TRUST, AND SOME OF THE TRUSTS ARE VALID AND OTHERS ARE NOT, the property vests in the trustees, the legal estate to be applied to the valid trusts only.

TRUSTS — PERPETUITIES. — If a testator devises his property to his sons, upon trust, to pay certain legacies, to manage the estate, to render just accounts to one another, and to hold the real property for six years without making any partition thereof, and declares that after that period all the property shall belong to them, but that if any of them shall seek partition within the time designated he shall forfeit his share, the will vests the estate in fee in such sons; and the condition against partition, being unlawful, is inoperative, and therefore does not impair the effect of the devise.

TRUSTS. — TO THE CONSTITUTION OF EVERY EXPRESSED TRUST there must be a trustee, an estate to vest in him, and a beneficiary. If property is devised to persons, to hold in trust, for their own benefit, no trust is created, but they take both the legal and equitable estate; for these two estates cannot be separately maintained in the same persons.

WILLS. — TRUST ESTATE WILL NEVER BE IMPLIED, WHERE IT WOULD RENDER THE WILL ILLEGAL AND VOID.

Thomas M. Tyng, for the appellant.

Sherman S. Rogers, for the respondents.

GRAY, J. Upon this appeal we are asked to pronounce invalid that disposition by the testator of his residuary estate which was made in favor of three of his sons, the plaintiff, another son, being excluded from any share thereof. As an heir, he brings this action for the partition of the decedent's real property, under section 1537 of the Code of Civil Procedure, and he attacks the devise to his brothers, as being void for offending against the statute of perpetuities.

After specific devises of realty, the testator, in the fifth clause of his will, gave all his residuary estate "unto my three sons, viz., John B. Greene, Harry B. Greene, and Samuel B. Greene, as trustees, to carry out the provisions of this . . . will, and execute the trusts hereinafter specified." In the following eight clauses, he directed them to pay certain pecuniary legacies, and he constituted two trust funds for the lives of his wife and a sister. The plaintiff received a pecuniary legacy. In the fourteenth clause, testator directed that his "said trustees shall take and hold my said property and estate, and the whole thereof, . . . for the period of six years from and after my decease; the estate being chargeable

with the payment of the foregoing bequests and legacies, and it being, as I now believe, with moneyed securities on hand, amply sufficient to pay said legacies in full, together with the taxes on my real property, so that at the expiration of said period the residue of said real estate should remain unencumbered and intact. After the payment of said legacies, the said property and estate shall be managed for the joint benefit of my said three sons, who shall annually render to each other a just and full statement of the rents, issues, and profits, and all transactions relating to said property and estate." Then follow two provisions, one empowering the trustees to sell all the realty, except certain specific pieces, on certain conditions, and the other enjoining against any partition or division of the estate devised in trust to his sons until the expiration of six years, under penalty of forfeiture of the interest of the son offending. Then follows this (the fifteenth) clause: "15. At the expiration of said period of six years, the rest and residue of my said estate, real and personal, remaining after the payment of said legacies and debts, shall belong to my said three sons, John B. Greene, Harry B. Greene, and Samuel B. Greene, share and share alike, their heirs and assigns forever."

The last clause in his will is termed by testator as "explanatory and qualifying." He says a partition of the estate "as at present situated" would be detrimental to his three sons, and that the personalty would nearly suffice to pay the legacies; but in case of an exigency, he authorizes them "to mortgage the real estate" for that purpose.

The difficulty which this will creates in the work of construction exemplifies the value of the rule which is controlling upon the courts in the interpretation of wills; that the intention of the testator, if discoverable and lawful, shall prevail and be effectuated. In this will the language is involved; clauses are in seeming conflict, and some provisions are illegal. But notwithstanding the confusion and conflict of language, a purpose is evident from a consideration of the whole testament, and that is, that the three sons, who are constituted executors and trustees, are to have the whole of the testator's estate which shall remain after the payment of legacies, etc. The idea is prominent that the personalty will suffice for every testamentary provision requiring the use of moneys by the executors. The restriction upon a partition between the sons

is, plainly, based upon the desire that the real estate shall be left to improve in value, and that its income shall meet any deficiencies in the application of the personalty to the payment of legacies, etc. Of the legality of such a restriction we shall speak hereafter. We shall first see if and how this will, in its residuary scheme, may be upheld.

By the fifth clause the testator, in terms, gives the residue of his estate to his three sons, as trustees, "to execute the trusts thereafter specified." Without the aid of this language we should have no difficulty in holding that that clause conferred a legal estate upon the trustees named, wherever a valid express trust was created. That principle was expressly declared in *Manice v. Manice*, 43 N. Y. 303, where there was a general devise of the residuary estate to the executors, in trust, for the uses and purposes set forth in the will. It was there considered that such a general devise in trust vested the legal estate in the trustees for such legal purposes as required it to be vested in them, and in other respects it would be inoperative. So in this case, the general devise in trust may apply to the valid trusts created for the testator's wife and sister, and will vest the trustees with the requisite legal estate. What, then, is in the remaining trust which the testator has attempted to create? Substantially, the trustees were to hold and manage the residue of the estate for six years, for the joint benefit of themselves, as the three sons, and at the expiration of that period of time it was given to them in equal shares absolutely. Such a trust would be wholly invalid, if for no other reason, because it would be for a period not measured by lives. But there is a fundamental objection to our construing this provision as a trust. To the constitution of every express trust there are essential these elements, namely, a trustee, an estate devised to him, and a beneficiary. The trustee and the beneficiary must be distinct personalities, or, otherwise, there could be no trust, and the merger of interests in the same person would effect a legal estate in him, of the same duration as the beneficial interest designed: 2 R. S. 727, secs. 47, 55; *Woodward v. James*, 115 N. Y. 346. That the legal and beneficial estates can exist and be maintained separately in the same person is an inconceivable proposition. It is quite as much of an impossibility, legally considered, as it is physically. These three sons would have the actual possession of the lands; they would be entitled to receive and retain and enjoy the rents and profits, and they and their heirs would

be subjected to no change of title or possession, nor other diminution of interest than what might be produced by an application of income, or of any proceeds of sales, to the payment of legacies. The result is, that they have every estate and interest in possession, in remainder and in reversion, or in other words, the whole fee of the property. It was the design of the legislature, in the revision of the statute of uses, to abolish technical and useless distinctions between the title and the use, and to convert the estate of a beneficiary into a legal estate, commensurate with the beneficial interest intended, whenever the trust was of a passive or formal character, and the actual possession and fruits of possession were the beneficiary's. Under section 47 of the article upon uses and trusts, if a person by virtue of a devise shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, he shall be deemed to have a legal estate of the same quality and duration, and subject to the same conditions as his beneficial interest. This article would distinctly operate upon the devise which this testator made in favor of his three sons, to vest in them, from the time of his death, a legal estate in fee in the lands, and the only conditions, subject to which the devisees would take, would be that the land might be resorted to for the payment of legacies, etc.

As executors, they would administer upon the personality in the payment of debts and legacies, and in the establishment of the trust funds directed. If the personality proved insufficient, they were to sell or mortgage the realty to complete that much of the testator's plan of distribution of his estate. Whether such a sale or mortgage would be made under the power conferred by the will, or whether it would be by contribution of the devisees is, obviously, quite a profitless discussion. The fact was, that the real estate was charged with the payment of debts and bequests in the hands of the devisees, and they were personally bound for the payment: *Brown v. Knapp*, 79 N. Y. 136.

It is in no wise necessary, and there are no conditions which demand, that we should construe an express trust out of the residuary devise for the three sons. The doctrine established by the cases is, that a trust estate will never be implied, where it would render a will illegal and void. If we were to hold this devise to be an express trust, we should be doing a work which would result in overthrowing the whole testamentary

scheme, for the accomplishment of no useful purpose, and not demanded by any legal principle.

If it is urged that the inhibition against a partition or a division of the estate for a period of six years and the restriction upon the power of alienation are provisions which for their illegality affect the will, the answer is, that, as invalid limitations upon the free ownership of the property devised, they are void, and may be disregarded: *Henderson v. Henderson*, 113 N. Y. 1, 15; *Harrison v. Harrison*, 36 N. Y. 543.

The present case illustrates the peculiar character of cases involving the construction of wills. Each case must be determined upon its own particular facts and features, and former precedents are rarely availing in the office of construction. The supreme importance of giving effect to the last will of the decedent requires the court to search out his intention and to validate his scheme, unless to do so would contravene the statute. The endeavor is to find a way of upholding the will, not of breaking it down; and thus in every case the inherent purpose, if lawful, should be effectuated through what legal channels of construction may be open. We should not make a new will for the testator, and we need not strain to support his testamentary plan, if the object is unworthy, or commands our just condemnation.

The complaint was properly dismissed by the trial court, and the judgment of the general term, affirming the judgment of dismissal, should be affirmed by us, with costs.

WILLS, INTERPRETATION OF. — In construing a will, the intention of the testator is to be ascertained and given effect: *Shadden v. Hembree*, 17 Or. 14; *Jasper v. Jasper*, 17 Or. 590; *Dulang v. Middleton*, 72 Md. 67; *Roe v. Vingut*, 117 N. Y. 204; *Bartlett v. Patton*, 33 W. Va. 71; *Morrison v. Sessions's Estate*, 70 Mich. 297; 14 Am. St. Rep. 500, and note. A will void in part may nevertheless be good for the residue: *Kane v. Gott*, 24 Wend. 641; 35 Am. Dec. 641. Of two constructions that may be put upon a will, the one which will sustain it is preferred to the one which will defeat it: *Roe v. Vingut*, 117 N. Y. 204.

READ v. WILLIAMS.

[125 NEW YORK, 560.]

WILLS, JURISDICTION TO CONSTRUCT. — Court of equity has jurisdiction in an action in behalf of the next of kin of a testator to construe a will disposing of personal estate, where the disposition made by the testator is claimed to be invalid and inoperative, though such next of kin claim in hostility to the will.

PERPETUITIES. — A PROVISION IN A WILL, SETTING APART A TRUST FUND TO BE PERPETUALLY KEPT by the trustees, and by them applied to cemetery purposes, is void, because it involves an unlawful suspension of the ownership of personal property.

WILL — DEVISE VOID FOR WANT OF DESIGNATION OF BENEFICIARIES. — A devise of the residue of testator's property to such charitable institutions and in such proportions as his executors and J. H. shall choose and designate, is void, because it substitutes for the will of the testator the will and discretion of the donees of the power; nor can such will be made valid by the donees of the power designating and thus making certain the beneficiaries.

J. Edward Swanstrom, Manley A. Raymond, P. H. Vernon, Fordham Morris, and John E. Parsons, for the appellants.

Charles A. Jackson, for the respondents.

ANDREWS, J. The jurisdiction of a court of equity to entertain an action in behalf of the next of kin of a testator for the construction of a will disposing of personal estate, where the disposition made by the testator is claimed to be invalid or inoperative for any cause, was asserted by the chancellor in *Bowers v. Smith*, 10 Paige, 200, and was maintained in *Wager v. Wager*, 89 N. Y. 161, and in *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420.

It is true that in such cases the next of kin claim in hostility to the will; but the executors, in case the disposition made by the testator is invalid or cannot take effect, hold the personalty upon a resulting trust for those entitled under the statute of distributions, and thereby the jurisdiction to bring an equitable action for construction, and to have the resulting trust declared by the court, attaches as incident to the jurisdiction of equity over trusts. The Code of Civil Procedure, section 1866, has extended the remedy so as to include suits for construction of devises in behalf of heirs claiming adversely to the will; and it would not be consistent with the spirit of this legislation to narrow the jurisdiction in cases of bequests of personalty. The case of *Chipman v. Montgomery*, 63 N. Y. 221, contains expressions which, considered independently of the facts of the case, may seem adverse to this view; but, as was

said by Rapallo, J., in *Wager v. Wager*, 89 N. Y. 161, "the plaintiffs there had, on their own showing, no present interest in the property, and might never have any." The case of *Horton v. Cantwell*, 108 N. Y. 255, was one also where the plaintiff had no interest in the ultimate disposition of the estate there in question, whether the clauses challenged were valid or invalid, and the court decided that she could not maintain the action.

It is not contended that the provision in the third paragraph of the will, and the modification thereof in the second paragraph of the third codicil, setting apart a trust fund to be perpetually kept by the executors and trustees and their successors, and directing the application of the income for cemetery purposes, can be upheld. These provisions are manifestly void, as involving an unlawful suspension of the absolute ownership of personal property.

The principal question in the case relates to the validity of the residuary clause in the second codicil. That clause is as follows: "11. After the payment and discharge of my just debts (if any there be), funeral expenses, and expenses of administration, and after all legacies and bequests mentioned in my last will and testament, as modified by my codicils, shall have been paid in full, if thereafter there shall be any residue and remainder of my estate and property, I give and bequeath such residue and remainder, after the same shall have been duly converted into money, as follows, viz.: To such charitable institutions and in such proportions as my executors, by and with the advice of my friend Rev. John Hall, D. D., shall choose and designate." Subsequent to the death of the testatrix, and prior to the commencement of this action, the executors, with the advice and approval of Dr. Hall, made a written choice and designation of certain incorporated charitable institutions organized or existing under the laws of this state, authorized to take real and personal property by devise and bequest, among whom they directed the residuary estate to be divided. It will be noticed that the particular donees of the gift are not designated in the will. They could not be known until the executors should select, in the manner pointed out, the particular charitable institutions which should take the bequest. The range of selection was unlimited, except that the appointees were to be institutions of charity, and perhaps, also, it is implied that they were to be incorporated charities, because a provision is made that the institutions selected shall be under no disability to accept the

legacy. But beyond this there was no limitation whatever. The selection was not confined to charitable institutions in this state or in the United States. If the power was valid, the executors, with the approval of Dr. Hall, might appoint the gift to charitable institutions anywhere in this country, or in foreign countries. The will did not, in terms, vest the title to the property in any one pending the exercise of the power of appointment. It was not given to the executors, nor was it given to any particular charitable institution which could be pointed out or ascertained at the death of the testatrix. If the property under the will vested anywhere, it was in the whole aggregate incorporated institutions of the whole world, capable of taking by the devise or bequest, subject to being divested in favor of such particular charities as should thereafter be designated by the executors.

The question presented is not an original one in this court. It was decided adversely to the defendants in the case of *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9. There is, between that case and this, no distinction in principle. In that case, the legal title to the fund was vested in the executors in trust. In this case, the executors were given simply a power in trust, without clothing them, in terms, with the legal title to the fund to be distributed. But this creates no legal distinction. The point of the decision in *Prichard v. Thompson*, 95 N. Y. 76, 47 Am. Rep. 9, is, that while the law recognizes the right of a testator by will to create powers of appointment and selection, and will sustain dispositions of property made pursuant thereto, although the testator himself did not designate the particular individuals in whose favor the power should be exercised, nevertheless, that this right is subject to the limitation that the testator must himself designate the class of persons in whose favor the power may be exercised, with sufficient certainty, so that the court can ascertain who were the objects of the power, and that a power to select the beneficiaries from among all the members of the community, or all corporations of a particular class, wherever they may exist, however numerous, is void for indefiniteness. Such a power is distinctly in contravention of the policy of the statute of wills. It substitutes for the will of the testator the will and discretion of the donees of the power, and makes the latter controlling in the disposition of the testator's property. That cannot fairly be said to be a disposition by the will of the testator, with which the testator

had nothing to do except to create an authority in another to dispose of the testator's property according to the will of the donee of the power, with no limitation except that the distribution shall be made among corporations to be selected from a large class of corporations, wherever existing, answering the description in the will.

The statute of powers does not define all the purposes for which a power over property may be created. It recognizes the existence of powers of appointment and selection which were well known to the common law. But, as pointed out in the opinion of Van Brunt, C. J., in the general term, the statute presupposes that a power of selection must be so defined in respect of the objects that there are persons who can come into the court and say that they are embraced within the class, and demand the enforcement of the power; and the same principle is recognized in the provision that "if the trustee of a power with a right of selection shall die leaving the power unexecuted, its execution shall be decreed in equity for the benefit of all persons designated as objects of the trust": 1 R. S., p. 734, sec. 100. It would be manifestly impracticable for the court to ascertain what corporations constituted the whole class of charitable institutions mentioned in the will, or to decree the execution of the power for the benefit of the numerous class embraced in the description. The difficulty in this case is not avoided because the power of selection has in fact been exercised, nor because it has been exercised in favor of corporations which, if they had been the direct objects of the testator's bounty, would have been entitled to take. The vice lies in the unauthorized power. What has been done under it is in a legal sense immaterial. The validity of the power depends upon its nature, and not upon its execution. The heirs and next of kin of the testatrix derive their title under the law of descents and distribution, and their rights attached immediately on the death of the testatrix to any part of the estate not validly disposed of by the will. If the power attempted to be created by the will was valid, their rights, whatever they were, were subject to it. If invalid, and there was no valid alternative disposition by the testator of the residue, they immediately became entitled. This question was considered by Rapallo, J., in *Holland v. Alcock*, 108 N. Y. 323, 2 Am. St. Rep. 420, and it is unnecessary to further elaborate it.

We are of opinion that the court below erred in holding that

the heirs of the testatrix are excluded, under the doctrine of equitable conversion, from any interest in the real estate of the testatrix remaining undisposed of. The testatrix intended to dispose of her whole estate, which consisted of both real and personal property. By the original will she gave the residue, after satisfying charges and legacies, to certain specified corporations, "after the same shall have been duly converted into money." By the seventh clause of the will she directed the executors to sell and convert into cash all her real estate, "and also to do all and other acts and things which may be proper and requisite in law for the purpose of and to accomplish the due payment of the bequests, and the carrying out all of the provisions in this my last will and testament contained." By her second codicil she revoked the residuary clause in the will, and substituted the power to the executors to dispose of the residue to which reference has been made, and in the gift to the institutions to be designated, she uses the same language as in the gift to the corporations in the will, viz., "after the same [her estate] shall have been converted into money." It seems to be quite clear that the conversion was directed for the purposes of the will. She may reasonably have supposed that it would be more convenient that the corporations should take their respective interests as money, and not as land. The personal estate was largely in excess of the sum required to pay charges and legacies outside of what was given by the residuary clause. The direction to sell the real estate apparently could have had no purpose except to accomplish an easy division of the residuary estate among the corporations to which it was to be given. The gift failing, the purpose of the conversion ceased, and the direction to sell the real estate was no longer imperative. The conversion was not directed for the purpose of distribution of the estate as money among the next of kin. The testatrix never intended that they should take it in any form. The case falls within the general principle, declared in many cases, that a power of sale in a will, however peremptory in form, if it can be seen that it was inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not operate as a conversion, where the scheme or purpose fails by reason of illegality, lapse, or other cause. In that case the property retains its original character, and it goes to the heir or next of kin as real estate or personalty, as the case may be. Nothing short of a clear intention, to be

collected from the will, that the land shall be sold and converted into money before division, whether the particular purpose fail or not, will be sufficient in equity to change the character of the property. In England, even this is not sufficient to exclude the heir, in the absence of an express gift of the proceeds away from him: *Fitch v. Webber*, 6 Hare, 145; *Hopkinson v. Ellis*, 10 Beav. 169; *Taylor v. Taylor*, 3 De Gex, M. & G. 190; 1 Williams on Executors, 663 et seq. In this country the courts do not seem to hold so strict a doctrine.

The result is, that the judgment should be reversed on the appeal of the infant defendant Kate Haddock, so far as it adjudges an equitable conversion, and in other respects it should be affirmed.

THE PRINCIPLES ANNOUNCED IN THE FOREGOING CASE were reaffirmed in *Forbick v. Town of Hempstead*, 125 N. Y. 581. In that case it appeared that the testator gave the residue of his estate to trustees for the establishment of a school and its permanent endowment for the education and benefit of such persons as should be admitted thereto by the trustees and their successors, which school was to be located in the township of Hempstead and to be known as the Hewlett Academy. The trustees were directed to apply to the legislature for the proper acts of incorporation, and when the corporation was formed, to transfer the funds to its trustees. In case any of the trusts should fail for any reason, then the testator gave all his property connected with the failing of such trusts or trust, one half to the corporation, rector, church-wardens, and vestrymen of Trinity Church, Rockaway, in the county of Queens, and the other one half to the town of Hempstead, to be kept as a fund for the support of the poor of such town, to be known as the Hewlett fund. On the trial of an action for the construction of the will, the bequest to the academy and that for the benefit of the poor of the town of Hempstead were both adjudged to be void. An appeal was taken to the general term, which determined that the bequest to the academy was void, but that to the town was valid, but that as there was no equitable conversion, the town could not take the real estate. A further appeal was prosecuted to the court of appeals, which, in giving its judgment, deemed it unnecessary to consider the question of equitable conversion, and, speaking by Peckham, J., disposed of the other questions as follows:—

“What, then, did the testator intend by the language of this bequest? Did he refer to those persons only who would answer the statutory definition of poor, for whose support the town would raise money, as provided by statute, to be expended by its officers elected or appointed for that purpose? or did he mean that broader class of people who, while not blind, lame, old, or impotent so as to be unable to work, would yet, in general estimation, be regarded as fit subjects of individual charity on account of their poverty,—people, in other words, who would have no statutory ground to ask for relief from the town officers, but who, from the necessities of their case, could appeal with almost irresistible force to the generosity of the charitable?

“I think it was the broader class. It seems to me that the testator had in mind that persons answering such description should be relieved as far as the funds provided by him would permit, and in such manner as to show that

the gift was from his bounty, and that the charity flowed from his fund to the recipient in each individual case. He did not wish the special character of this fund to be lost by the simple addition of that amount to the town moneys raised for the support of the statutory poor; but every time an individual was relieved by moneys arising from it, he wanted that individual to feel that he was relieved by the bounty of the testator.

"I reach this conclusion from an examination of the language of this will. He gives one half of the residue of his estate to this town, to be kept as a fund for the support of the poor of said town, and to be known as the Hewlett fund. Its special character would be lost as a mere addition to the moneys raised by the town. It would go into the hands of the town officers precisely like the moneys raised by taxation, and would substantially form a part thereof, and it would be paid out by them the same as such moneys, and in that way its identity as the Hewlett fund would be ignored.

"The recipient of the public alms of the town would probably recognize nothing of the difference in source from which any part of the moneys came, but the whole would be regarded as provided by the town and raised by taxation.

"The testator evidently attached some importance to the naming of the fund, and to its separate preservation as the Hewlett fund, and it can only be, as it seems to me, because he was desirous of perpetuating his name among the poor of the town as their benefactor to the extent of that fund. To mingle its income or its principal with the town moneys, and to pay it all out indiscriminately as town moneys raised by taxation, would, as I think, seriously impair the fulfillment of that desire.

"Again, I think the natural inclination of an individual would be to the broader class, because otherwise the gift is really not to the poor, but to the town, to aid it in the discharge of its own statutory duty, and in that way to lessen the taxes on the community at large. The tax-payers of the town may not all answer the description of rich men, but they certainly would still less answer the description of the poor of the town; and yet the gift would be to the tax-payers, in effect, if the other interpretation were adopted. It would be to them, in effect, because the probable and natural result of such a bequest would be, not to make an addition to the fund available for the support of the town poor by just the amount of the gift, but to decrease by just that sum the amount which would otherwise be raised by taxation. Language in some respects like that used in this will has been held, in England, to create a charitable trust fund to be expended by the corporation in aid of the poor, and not of the poor-rates. Some of the English cases held that the fund was intended to be distributed to the poor, to the exclusion of those who were town charges, and some held that the distribution was intended to be indifferently to both classes, but not in exoneration of the poor-rates. These cases were cited by counsel for the executor, and will be found in the synopsis of his brief by the reporter.

"I think, too, that this fund was given, in trust and in perpetuity, to the town, to be kept as a fund, and the income only to be used for the purpose indicated in the will. How could it be kept as a fund which was to be known as the Hewlett fund, if the principal were to be paid out at any time? To be kept as a fund under the circumstances of this case, and where the gift is to a corporation, must mean to be perpetually kept as a fund. The fact that the word 'trust' is not used is of no great importance. The language which is used imports, necessarily, that the income only of the gift is to be used by the town, and for the purpose of doing something which the town is not

otherwise legally called upon to do. The town owes no legal duty to the broad class of poor people intended to be benefited by this provision in their favor. And when the bequest is thus made to the town, it must be on the trust that it will carry out the purpose of the giver, although it is much broader than any legal liability of its own, and consequently the gift cannot be for its own sole benefit. If not for its own sole benefit, then it must be in trust for the benefit, to a greater or less extent, of some other person, body, or class.

"Having reached the conclusion that the testator intended by his will to create a fund to be given in trust to the town in perpetuity, the income only to be used for the benefit, generally, of the poor of that town, and not to be confined to the class of poor which the town was under a statutory liability or duty to support, we may now inquire whether such intention can be lawfully carried out.

"Regarding the questions in this case in the light we do, it is unnecessary to determine whether the town has the legal power to take gifts by bequest absolutely, to be applied by it in its discretion to some one or all of its corporate or administrative purposes, or to take in the same way such gifts in trust, and the income only to be applied to some named corporate or administrative purpose. It may be conceded that it has both powers.

"The question still remains whether the trust which the testator has attempted to create is a void trust. In *Shotwell v. Mott*, 2 Sand. Ch. 46, a trust quite as vague as is the one under discussion was held to be valid; and if that case were still an authority in this state, we should have no difficulty in upholding this trust, so far as the question of an ascertained beneficiary is concerned.

"That case was decided soon after the adoption of the Revised Statutes, and it held that they did not apply to charitable uses, but that they were aimed at private trusts and accumulations for posterity; that public trusts and charitable uses were not within the intention of the legislature or the spirit of the enactment. The trust was upheld under the doctrine of charitable trusts.

"The *Shotwell* case was alluded to in *Bascom v. Albertson*, 34 N. Y. 584, 609, by Porter, J., and shown to have been overruled; and in *Holmes v. Mead*, 52 N. Y. 332, 337, Allen, J., maintained that it had never been accepted by the profession.

"It would be quite inappropriate to now repeat the history of the contest in this state upon the question whether the English doctrine of charitable uses ever prevailed here. A general review of that contest was made by the late Judge Rapallo in the recent case, in this court, of *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, and his opinion leaves nothing to be added on that subject.

"That case leaves the doctrine no longer in doubt that to constitute a valid trust there must be a defined beneficiary, and the absence of such is, as a general rule, fatal to the validity of a testamentary trust. Is there any such beneficiary named or to be found in this will? The learned counsel for the town says there is, and founds his assertion upon the claim that the beneficiaries are composed of the class defined by law, and are limited to such poor persons as the town is now or may from time to time be compelled to support. But we hold that the testator did not intend to limit his charity by any such boundary. His intention was, as we have already stated, to embrace within his charity a much broader, while at the same time a much less well-defined, class, depending very greatly upon the individual views of the per-

son or persons who, for the time being, exercised the trust; and we say to such an extent is the power of choice vested in the trustee that no one could claim the enforcement of the trust in his own favor or in favor of others. The beneficiaries are neither named nor capable of being ascertained within the rules of law applicable to these cases. I think this is now necessary, in order to create a valid trust.

"The case of *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, is no authority for the validity of this trust. That case is authority for the proposition that a testator may confer upon his executors or trustees the power to divide a bequest or devise among such persons as they may select from certain classes which are designated by the testator, where such classes are sufficiently identified, described, and limited, as not to render the devise or bequest void for uncertainty. It was also therein held that a description of the beneficiaries by the testator as 'such Roman Catholic charities, institutions, schools, and churches capable of taking by devise and bequest in the city of New York' as the majority of his executors should decide, and in such proportions as they should think proper, was sufficiently definite to be valid. The necessity of an ascertained beneficiary was recognized. The will simply gave a power to the executors to decide which should have the property or money, once for all, and in what proportions, out of a class sufficiently described and identified in the will, so as not to render the devise or bequest void for uncertainty. That is a very different power from the one attempted to be conferred by this will; for here the beneficiaries are not capable of definite ascertainment, but depend forever upon the personal choice of a trustee or trustees, who may give to A to-day, and refuse to give to him next week, under precisely the same facts. Others may have come under the observation of the trustees in the mean time who are, in their judgment, even more than A, proper objects of the charity of the testator. No definite class is described, limited, or identified in the will under consideration. Judge Rapallo, in the case of *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, speaks of this case of *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, and says that it was regarded as going a great ways in holding the beneficiaries sufficiently defined or capable of ascertainment, and the court, in other cases since that, has announced that the decision was not to be extended. See *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9.

"We are entirely convinced that a bequest at this day to a town, in trust, in perpetuity, for the benefit of the poor of the town, not confined to those for whose support the town is under a statutory liability, is invalid for the want of an ascertained beneficiary.

"The support of those persons who do not fall within the description of persons for whose support the town is under any statutory or other legal obligation is not so germane to the purposes of town organization as to make a trust for that object on the part of the town valid. The fact that the bequest is to a town does not overcome the fatal objection of the want of a beneficiary ascertained or ascertainable, and no function of a town as a corporation, either for corporate or administrative purposes (whatever the distinction may be), is subverted by a bequest for the support of the poor for whose support it is under no legal obligation to provide, either in whole or in part.

"Special grants of power have been supposed necessary in order to enable cities and villages to act as trustees of property given for charitable purposes, including the relief of distress, and the absence of any such enabling statute in the case of towns is quite potent evidence that they have no such

power: Laws of 1840, c. 318, sec. 2; Laws of 1841, c. 261, an addition to the above act.

"In holding this bequest to the town of Hempstead to be a trust, I have not overlooked the cases cited by counsel, which decide, as he claims, that gifts of this nature to a town are absolute. In *Williams v. Williams*, 8 N. Y. 525, the bequest to the trustees of the church in the village of Huntington, and their successors, in trust, for the support of a minister, was held valid, for reasons given by Denio, J., in his opinion. He held that the gift was for one of the purposes for which the corporation was created, and that it was not necessary to the validity of a bequest to a religious corporation that it should be given generally for all the purposes for which it may be legally used; that the corporations of a religious nature were authorized to take property for the use of the society, 'or other pious uses,' and that a benefactor might apply his bounty to the whole or any one or more of the various purposes for which the corporations were authorized to hold property.

"Thus in the case at bar, if the bequest had been for the support of those poor persons for whose maintenance the town was legally liable to provide, it might in that case be claimed, perhaps, that such bequest was for one of the purposes for which the town was organized or incorporated, and was therefore valid.

"The objection that the legacy was illegal, and creating a perpetuity contrary to the provisions of 1 Revised Statutes, page 773, section 1, was surmounted by Judge Denio, in the *Williams* case, by showing that religious corporations, before the Revised Statutes, were authorized to hold real and personal estate in perpetuity, and that the power was not taken away by the adoption of those statutes; that as such corporations had the power to take and hold property in perpetuity for the purpose of their incorporation, it was legal for a donor to prescribe, by way of limitation, that his gift should be kept and preserved so as to subserve the purposes which the corporation was created to promote, and that it was no more than to declare that the property should be devoted to the objects which the legislature had in view when providing for the existence of the corporation.

"The learned judge was also of the opinion that the statutes concerning expectant estates in personal property were not applicable to property bequeathed to one of these charitable corporations to be applied to any corporate purpose; the legislature never intended that the statutes should reach so far as to include corporations holding property which they had a right to hold for corporate purposes, although the property was to be held in perpetuity and the income only applied to one or more of such purposes.

"In *Adams v. Perry*, 43 N. Y. 487, 500, Grover, J., was of the opinion that the reason why gifts to such corporations were valid was, that by their charters they were authorized to take and hold property, and were thus exempted from the operation of the law regarding the suspension of the absolute power of alienation of real and the absolute ownership of personal property. It is seen, however, that the gift, in order to take effect as an absolute one, must be for some one or all of the purposes for which the corporation was created. If the gift were to the town for the purpose of investing the principal and applying the income to the support of an opera company, it could not be said that the gift was an absolute one, and that the town took it with the right to apply it to any of its corporate purposes. It would be a gift in trust, to apply it to certain purposes not corporate, and the trust and the gift would alike be void.

"It is this circumstance, that the gift in this case is not for corporate pur-

poses, which takes it out of the principle upon which the cases cited were decided. The cases of *Welmors v. Parker*, 52 N. Y. 459, *Le Conteulx v. Bufalo*, 33 N. Y. 333, *Vail v. Long Island R. R. Co.*, 106 N. Y. 283, 60 Am. Rep. 449, were all instances of a gift to a corporation having power to take for the purpose that the gift was intended, and hence a direction, accompanying the gift, that it was to be used only for a corporate purpose, or that the income only was to be used, did not create a trust. It was simply saying that the gift was for the purpose of aiding the corporation in the discharge of some of its corporate functions.

"It has been argued that where a legacy is given to a corporation having power to use the money for several and distinct corporate purposes, to be applied to one corporate purpose only, the gift was not absolute, but was in trust, to be applied as directed by the donor. Whether that be true or not, is immaterial here. The purpose of the gift in this case was outside of any corporate or administrative purpose."

RIDDEN v. THRALL.

[126 NEW YORK, 572.]

GIFT CAUSA MORTIS — EVIDENCE. — Where the fact of a gift *causa mortis* is testified to by the donee or a member of his family, a writing executed by the donor a few days before making the alleged gift is admissible as corroborative evidence, if it shows an intention to give, and thus corroborates the evidence of a gift subsequently made.

GIFT CAUSA MORTIS OF MONEY DEPOSITED IN BANK may be consummated by a delivery to the donee of the bank-book representing the deposits, though the corporation with which the deposits were made had adopted a by-law declaring that drafts may be made personally, or by an order in writing by the depositor, or by his power of attorney, duly authenticated, and that any one presenting such order or power of attorney must be known, or made known, as one authorized to receive the money.

GIFT CAUSA MORTIS MAY BE MADE BY ONE IN APPREHENSION OF DEATH FROM A SURGICAL OPERATION to which he intends voluntarily to expose himself, if such operation is made necessary by a present disease.

GIFT CAUSA MORTIS MUST BE IN APPREHENSION OF SOME PRESENT DISEASE or some other impending peril, and becomes void upon recovery from the disease or escape from the peril.

GIFT CAUSA MORTIS NEED NOT BE MADE IN EXTREMIS when there is no time or opportunity to make a will.

GIFT CAUSA MORTIS WHEN DEATH DID NOT RESULT FROM THE DISEASE OR PERIL APPREHENDED. — If a gift *causa mortis* is made in view of the peril of a surgical operation to which the donor is about to submit, and he, after submitting to the operation, and before his recovery therefrom, dies from another disease or cause, the gift is valid. It is true that such a gift becomes inoperative if the donor recovers from the disease or escapes the peril in contemplation when it was made; but if he does not recover, the gift is good, though his death results from a cause not apprehended by him.

Carlisle Norwood, Jr., for the appellants.

John H. Corwin and William D. Veeder, for the respondent.

EARL, J. On the first day of October, 1888, Charles H. Edwards had money on deposit in savings banks, and kept the savings banks' books in a tin box, and on that day he delivered the tin box to the plaintiff, informing him that he was about to go to St. Luke's Hospital, in the city of New York, to have an operation performed for hernia, and that he was apprehensive he might die from the result of the operation, and said to him that if he did not return, he gave him the box and its contents. He went to the hospital on the next day, and on the fifth day of October an operation was there performed for inguinal hernia. The operation was not dangerous, and was apparently successful. But on the sixteenth day of October he suddenly died, from heart disease, with which he was afflicted when he went to the hospital. He had not returned from the hospital, and had not recovered from the disease for which the operation was performed, nor from the results of the operation.

The defendants claim that the circumstances were such that a valid gift was not made, mainly because Edwards did not die from the disease on account of which he went to the hospital, and from which he apprehended death might ensue.

The case is novel in some of its features, and interesting. I have carefully considered the able argument submitted on behalf of the appellants, and am satisfied that the judgments of the courts below upholding the gift are right.

The gift was sufficiently proved. The facts which took place at the time of the gift, on the first day of October, were testified to by the plaintiff's wife. There were sixteen bank-books, and they represented about forty thousand dollars of deposits. Such a gift should be proved by very plain and satisfactory evidence, and if the case depended upon the evidence of the wife alone, any court might well hesitate to uphold the gift. But on the previous day (September 30th) Edwards wrote the following letter, addressed to the plaintiff: —

"*Friend Jim*, — Should I not survive from the effects of the operation about to be performed on me at St. Luke's Hospital, this is my last will and request, that you will take charge of my body, and have it placed in my family plat in Greenwood Cemetery, and also that you will take full charge of all my personal effects of every kind, and to have and hold the same unto yourself, your heirs and assigns forever. You will find my papers and all my accounts in the box.

"C. H. EDWARDS."

This was inclosed in an unsealed envelope, addressed to the plaintiff, and placed by Edwards in the bureau in the room occupied by him in plaintiff's house, where it was found about a week after his burial by plaintiff's wife and his aunt, both of whom proved the handwriting to be that of the donor. The genuineness of this letter was not disputed upon the trial. While, standing alone, it would not have been sufficient to establish the gift, it furnishes strong confirmation of the evidence of plaintiff's wife as to the gift, and leaves no reason to doubt that it was made as she testified. It was competent as corroborating evidence, just as the oral or written declarations of the donor previously made would have been, showing the intention to give, and thus corroborating the evidence as to the actual gift subsequently made. I have found no authority condemning such evidence. In all cases where probate of a will is contested on the ground of undue influence, fraud, incompetency, or forgery, the previous declarations or statements, in any form, of the testator, showing an intention in harmony with the instrument offered for probate, have always been held competent, — not as sufficient, standing alone, but as corroborating the other evidence offered by the proponent.

The gift was consummated by the delivery of the books, and no other formality was needed to constitute the actual delivery of the bank deposit needful to vest the possession and title in the donee. In savings banks in this state, such deposit-books are issued as evidence of the indebtedness of the banks. Withdrawals of deposits are entered in the same books, so that the deposit-book always, with the addition of any interest, shows the actual state of the accounts between the depositor and the bank, and the whole indebtedness of the bank. It answers the same purpose in the case of a savings bank that is answered by a certificate of deposit in the case of other banks. The decisions are not entirely harmonious as to the sufficiency of the mere delivery of such deposit-books to constitute a valid gift, either *inter vivos* or *causa mortis*. But the general rule in England and in this country, and particularly in this state, is, that any delivery of property which transfers to the donee either the legal or equitable title is sufficient to effectuate a gift; and hence it has been held that the mere delivery of non-negotiable notes, bonds, mortgages, or certificates of stock is sufficient to effectuate a gift: 2 Redfield on Wills, 312; *Westerlo v. De Witt*, 36 N. Y.

340; 93 Am. Dec. 517; *Champney v. Blanchard*, 39 N. Y. 111; *Penfield v. Thayer*, 2 E. D. Smith, 305; *Walsh v. Sexton*, 55 Barb. 251; *Johnson v. Spies*, 5 Hun, 468; *Allerton v. Lang*, 10 Bosw. 362; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39; *Bates v. Kempton*, 7 Gray, 382; *Chase v. Redding*, 13 Gray, 418; *Pierce v. Boston Savings Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Tillinghast v. Wheaton*, 8 B. L. 536; 5 Am. Rep. 621; 94 Am. Dec. 126; *In re Mead*, L. R. 15 Ch. Div. 651; *Moore v. Moore*, L. R. 18 Eq. 474.

But the learned counsel for the appellants calls our attention to one of the by-laws of the bank, printed in the deposit-book in question in this action, and claims that the delivery was not effectual without the written order of the donor. The by-law is as follows: "Drafts may be made personally or by the order, in writing, of the depositor, if the bank have the signature of the party on their signature-book, or by letters of attorney duly authenticated; but no person shall have the right to demand any part of the principal or interest without producing the pass-book, that such payments may be entered therein. If the person giving the order or power of attorney cannot write, he or she must make his or her mark, in the presence of a subscribing magistrate or some one whose signature is known at the bank, and any person presenting said order or power of attorney must be known or made known to the bank as the one authorized to receive the money."

This by-law requires an order or power of attorney when some one seeks to draw money for the depositor, or the depositor's money. But the depositor can draw the money without making an order, simply by the presentation of the deposit-book, and so can any owner of the book. Suppose the plaintiff had purchased the book, and had thus become the absolute owner thereof; he could have drawn the money, as owner, on presentation of the book, and the bank could not have required, as a condition of payment, that he should procure a power of attorney or an order from one having no interest, legal or equitable, in the deposit. The owner, in such a case, should produce satisfactory evidence of his ownership of the book, and if the bank refused to pay, he would be obliged to establish such ownership by any competent evidence, and nothing more; and his rights as purchaser would be no greater than his rights as donee. He has the same right to enforce a payment that he would have had if he had been the donee of any non-negotiable chose in action, or a

certificate of deposit, or unindorsed note. He could establish his right to payment in such a case by any proof showing that he was the absolute legal or equitable owner.

The claim is also made that the donor could not make the gift in the apprehension of death from a surgical operation to be performed in the future, to which he intended voluntarily to expose himself. But, without taking a broader view, death from a surgical operation made necessary by a present disease is, in a proper sense, death from the disease, and the gift may, in such case, be upheld as made in the apprehension of death from the disease.

We now come to the question, Was the gift invalid because the donor did not die of the same disease from which he apprehended death?

Gifts *causa mortis*, as well as gifts *inter vivos*, are based upon the fundamental right every one has of disposing of his property as he wills. The law leaves the power of disposition complete, but, to guard against fraud and imposition, regulates the methods by which it is accomplished.

To consummate a gift, whether *inter vivos* or *causa mortis*, the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos*, the moment the gift is thus consummated it becomes absolute and irrevocable. But in the case of gifts *causa mortis* more is needed. The gift must be made under the apprehension of death from some present disease or some other impending peril, and it becomes void by recovery from the disease or escape from the peril. It is also revocable at any time by the donor, and becomes void by the death of the donee in the lifetime of the donor. It is not needful that the gift be made *in extremis*, when there is no time or opportunity to make a will. In many of the reported cases, the gift was made weeks, and even months, before the death of the donor, when there was abundant time and opportunity for him to have made a will. These are the main features of a valid gift *causa mortis*, as they are set forth in many text-books and reported cases: Just. Inst., lib. 2, tit. 7, sec. 1; Mackelvey's Roman Law, sec. 793; California Civ. Code, secs. 1149, 1151; 1 Roper on Legacies, 26; 2 Schouler on Personal Property, 157; 2 Kent's Com. 444; Story's Eq. Jur., secs. 606, 607; Pomeroy's Eq. Jur., sec. 1146; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313; *Williams v. Guile*, 117 N. Y. 343; *Basket v. Hassell*, 107 U. S. 602.

Counsel for the appellants would add one more prerequisite to an effectual gift, and that is, that the donor, when the gift has been made in the apprehension of death from disease, must have died of the same disease, and he calls our attention to expressions of judges to that effect. I have examined all the cases to which he refers, and many more, and find that these expressions were all made in cases where the donor died from the same disease from which he apprehended death when he made the gift, and that none of them were needful to the decisions made. The doctrine meant to be laid down was, that the donor must not recover from the disease from which he apprehended death. I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the same time, but not known.

There is no reason for this additional prerequisite. The rule is, that the donor must not recover from the disease from which he then apprehended death. If he recovers, the gift is void; if he does not recover, and the gift is not revoked, it becomes effectual. In this case the condition was, that if he did not recover from the consequences of the operation, and return from the hospital, the gift should take effect. That was a perfectly lawful condition for him, as the owner of the property, to impose, and no reason can be perceived for refusing to uphold a gift made under such circumstances. A donor may have several diseases, and may, in making a gift, apprehend death from one, and not from the others; and shall the gift be invalid if, before he recovers from the disease feared, he dies from one of the other diseases? In such a case it might be, and generally would be, difficult, if not impossible, to tell what share any of the diseases had in causing the death. No medical skill could ordinarily tell that the donor would have succumbed to the disease feared, if the other diseases had not been present. Here the immediate cause of death appeared to be heart disease, and the autopsy did not disclose that there was any connection between the hernia or the operation and the heart disease. But who could tell that the death would have ensued from the heart disease at that particular time but for the operation? No medical skill can tell that the shock from the operation, and the debility and disturbance caused thereby, did not hasten death; and the death, therefore, in a proper sense, may have ensued, and probably did ensue, from both causes.

Sound policy requires that the laws regulating gifts *causa*

mortis should not be extended, and that the range of such gifts should not be enlarged. We therefore confine our decision to the precise facts of this case, and we go no further than to hold that when a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual.

The judgment should be affirmed, with costs.

GIFTS CAUSA MORTIS. — For instances of what constitutes a gift *causa mortis*, see *Woodburn v. Woodburn*, 123 Ill. 608; *Williams v. Guile*, 117 N. Y. 343; *Denol v. Dye*, 123 Ind. 321; *Fearing v. Jones*, 149 Mass. 12; 14 Am. St. Rep. 392. And as to what does not constitute a gift *causa mortis*, see *Trenholm v. Morgan*, 28 S. C. 268; and upon the question of gifts *causa mortis* generally, see notes to *Appeal of Waynesburg College*, 59 Am. Rep. 253, 254; *Pope v. Burlington Sav. Bank*, 48 Am. Rep. 787-790; *Brunn v. Schuett*, 48 Am. Rep. 506-511; *Sheedy v. Roach*, 26 Am. Rep. 634-637; *Bradley v. Hunt*, 23 Am. Dec. 600-606.

AMERICAN RAPID TELEGRAPH COMPANY v. HESS.

[125 New York, 641.]

INTEREST IN STREETS. — Statutes authorizing a corporation to construct lines of telegraph along and upon public streets, by the erection of the necessary fixtures, including posts, piers, and abutments for maintaining wires, do not grant any interest in such streets, and at most confer a license to enter thereon for the purposes named, and merely determine that one of the purposes for which the street may be used is the erection of poles and the stringing of wires for the business of telegraphing, and that such use is a public one, not inconsistent with the use of the streets for general street purposes. The legislature did not intend by these statutes to divest itself, and it could not divest itself, of its control of the streets for the public welfare. The license conferred can be modified or revoked at any time when the public interest may so require.

GRANT OF THE RIGHT TO USE PUBLIC STREETS TO MAINTAIN AND OPERATE TELEGRAPH LINES is subject to the control and regulation of the legislature. Such grant does not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the public; and if the poles and wires become a serious obstruction and nuisance in the streets, the legislature may take such action, and make such provisions by law, as are needful to remove the nuisance and restore the utility of the streets for public purposes.

STATUTES REQUIRING THAT TELEGRAPH, TELEPHONE, AND ELECTRICAL WIRES AND CABLES IN CITIES having a population of five hundred thousand shall be placed under the surface of the streets, lanes, and avenues of the city are valid and enforceable, though previous statutes had granted permission to maintain telegraph lines and poles upon the streets of such city. The statute may also require all subways for underground con-

ductors of electricity to be built under the direction of the board of commissioners of electrical subways, and give the board authority to require all owners or operators of electrical conductors aboveground to make connection with such underground subways as shall be determined by the board, and to remove their poles and wires from the streets within ninety days after notice, and in the event of their refusal to make such removal, the authorities of the city may be authorized to do so.

ACTS OF CONGRESS PURPORTING TO GRANT TELEGRAPH COMPANIES the right to construct and maintain lines of telegraph through, over, and along any of the military or post roads of the United States do not deprive the state of its control over its highways and its right to regulate their use, by the police powers, for the public welfare, and hence do not confer the right to maintain telegraph poles and wires above the surface of the public streets after the enactment of a statute by the state requiring them to be placed underground.

William G. Wilson, for the appellant.

D. J. Dean, for the respondents.

EARL, J. Prior to 1883, the plaintiff was incorporated under the act 265 of the Laws of 1848, the general act for the incorporation and regulation of telegraph companies, and the acts amendatory thereof, and prior to that year it had erected its lines of telegraph poles and wires in the streets of the city of New York, described in the complaint. It also had extensive connecting lines in other states and throughout this state, which constituted a system of telegraphy then in active use and operation.

Section 5 of the act of 1848 provides as follows: "Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways or across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines; provided the same shall not be so constructed as to incommode the public use of said road or highways, or injuriously interrupt the navigation of said waters; nor shall this act be so construed as to authorize the construction of any bridge across any of the waters of this state."

The act chapter 471 of the Laws of 1858 amends the act of 1848, and section 2 thereof provides as follows: "Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph upon, over, or under any of the public roads, streets, and highways, and through, across, or under any of the waters within the limits of this state, subject to the restrictions in the said recited act contained."

The plaintiff constructed its telegraph lines in the streets of the city of New York, under the acts referred to, without any special grant or authority from the city.

The claim of the plaintiff is, that these acts operated as a grant to it of a franchise to use the streets for its poles and wires, and that therefore an inviolable contract was created which is under the protection of the federal constitution, and hence that neither the state nor the city, under its authority, could cause its poles and wires to be removed from the streets, except upon compensation to it, ascertained in the manner prescribed by the constitution and laws for cases where private property is condemned for public use.

We think the act of 1848 as amended in 1853 can in no proper sense be said to have granted any interests to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant. They at most confer upon the plaintiff an authority or license to enter upon the streets for its purposes, and subject to certain conditions. The people of the state do not own the streets, and the only authority the legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts it, in effect, determined that one of the purposes for which the streets could be used was the erection of poles and stringing of wires for the business of telegraphing, and that that was a public use not inconsistent with the use of the streets for general street purposes. These were general, public legislative acts in the exercise of the police power of the state, and therefore they were not beyond the reach or touch of future legislation. The legislature did not intend to divest itself, and could not divest itself, of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license, which has been acted upon by the plaintiff, the legislature could revoke the license or modify it in any way or at any time when the public interest might require it.

But in this case it is not necessary to hold that the plaintiff did not, by the acts referred to, obtain some sort of franchise in the streets of the city. We may, for the present purpose, construe these acts as constituting, in some sense, grants of interests in the streets to the companies organized under

them, and contracts *sub modo* with such corporations, and yet the contention of the plaintiff in this case must fail.

In the exercise of its rights under the assumed grant and contract, this corporation was subject to the regulation and control of the legislature. By giving the franchise the state did not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the people, nor did the state absolve itself from its primary duty to maintain the streets and highways of the state in a safe and proper condition for public travel and other necessary street and highway purposes. The grant, if any, was made in reference to the streets, and their maintenance and regulation forever as streets. The state could at all times regulate the size and location of the poles, the height of the wires from the surface of the ground, and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets, from any cause, it could take such action and make such provisions by law as were needful to remove the nuisance and restore the utility of the streets for public purposes. The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which, by public authority, occupy the streets and highways of the state. The state, in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority.

Now, what has the legislature attempted to do in this case? By the act chapter 534 of the Laws of 1884 it was provided that all telegraph, telephone, and electric-light wires and cables, in all cities of the state having a population of five hundred thousand or over, "shall hereafter be placed under the surface of the streets, lanes, and avenues" of the city, and that it should be accomplished before the first day of November, 1885. It was further provided that in case the owners of the property specified should fail to comply with the act within the time specified, the local governments of the cities should

The plaintiff constructed its telegraph lines in the streets of the city of New York, under the acts referred to, without any special grant or authority from the city.

The claim of the plaintiff is, that these acts operated as a grant to it of a franchise to use the streets for its poles and wires, and that therefore an inviolable contract was created which is under the protection of the federal constitution, and hence that neither the state nor the city, under its authority, could cause its poles and wires to be removed from the streets, except upon compensation to it, ascertained in the manner prescribed by the constitution and laws for cases where private property is condemned for public use.

We think the act of 1848 as amended in 1853 can in no proper sense be said to have granted any interests to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant. They at most confer upon the plaintiff an authority or license to enter upon the streets for its purposes, and subject to certain conditions. The people of the state do not own the streets, and the only authority the legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts it, in effect, determined that one of the purposes for which the streets could be used was the erection of poles and stringing of wires for the business of telegraphing, and that that was a public use not inconsistent with the use of the streets for general street purposes. These were general, public legislative acts in the exercise of the police power of the state, and therefore they were not beyond the reach or touch of future legislation. The legislature did not intend to divest itself, and could not divest itself, of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license, which has been acted upon by the plaintiff, the legislature could revoke the license or modify it in any way or at any time when the public interest might require it.

But in this case it is not necessary to hold that the plaintiff did not, by the acts referred to, obtain some sort of franchise in the streets of the city. We may, for the present purpose, construe these acts as constituting, in some sense, grants of interests in the streets to the companies organized under

them, and contracts *sub modo* with such corporations, and yet the contention of the plaintiff in this case must fail.

In the exercise of its rights under the assumed grant and contract, this corporation was subject to the regulation and control of the legislature. By giving the franchise the state did not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the people, nor did the state absolve itself from its primary duty to maintain the streets and highways of the state in a safe and proper condition for public travel and other necessary street and highway purposes. The grant, if any, was made in reference to the streets, and their maintenance and regulation forever as streets. The state could at all times regulate the size and location of the poles, the height of the wires from the surface of the ground, and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets, from any cause, it could take such action and make such provisions by law as were needful to remove the nuisance and restore the utility of the streets for public purposes. The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which, by public authority, occupy the streets and highways of the state. The state, in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority.

Now, what has the legislature attempted to do in this case? By the act chapter 534 of the Laws of 1884 it was provided that all telegraph, telephone, and electric-light wires and cables, in all cities of the state having a population of five hundred thousand or over, "shall hereafter be placed under the surface of the streets, lanes, and avenues" of the city, and that it should be accomplished before the first day of November, 1885. It was further provided that in case the owners of the property specified should fail to comply with the act within the time specified, the local governments of the cities should

remove, without delay, all such wires, cables, and poles whenever found in their respective cities. Under that act no property was or could be taken from any of the owners specified. They were simply required to remove their poles and wires from the surface of the streets, and place the wires underground. Their property was not taken, but the use of their franchise was regulated. In 1885, chapter 499 was enacted, which provided for the appointment of a board of commissioners of electrical subways, and that board was charged with the duty of enforcing the provisions of the act of 1884. It was made the duty of that board to cause to be removed from the surface of the streets and put and maintained underground, whenever practicable, all electrical wires and cables, so as to enable and require all duly authorized companies operating the same to transact their business with underground conductors whenever practicable. All subways for underground conductors of electricity were required to be built under the direction and control of that board, and no electrical wires or cables were to be allowed above the surface of the streets without the permission of the board. Commissioners were duly appointed under that act, and in 1886 the Consolidated Telegraph and Electrical Subway Company of New York having been incorporated under the laws of this state, the commissioners entered into a contract with it, whereby it contracted to build, with its own capital, the necessary subways for the electrical conductors, the subways to be constructed in all respects subject to the approval of the commissioners. It was also provided in the contract that all corporations owning and operating electrical wires above the streets should have the right to place them in the subways under certain conditions specified. In 1887, the legislature enacted chapter 716, entitled "An act in relation to electrical conductors in the city of New York." By that act, the agreement made between the subway commissioners and the Consolidated Telegraph and Electrical Subway Company above referred to was ratified and confirmed, and the act provided that whenever, in the opinion of the board of electrical control constituted by that act, sufficient conduits or subways underground shall have been made ready, the board shall notify the owners or operators of the electrical conductors aboveground in such streets or locality to make such electrical connections in such underground conduits or subways as shall be determined by the board, and to remove their poles and wires from

the street within ninety days after such notice. This provision was made a police regulation in and for the city of New York, and in case it was not complied with by the telegraph or other companies referred to, it was made the duty of the commissioner of public works to cause the poles, wires, etc., to be removed forthwith by the bureau of encumbrances, upon the written order of the mayor to that effect.

Subways having been constructed in certain of the streets of the city of New York, by the Consolidated Telegraph and Electrical Subway Company, under the supervision and with the approval of the board of electrical control, notice was given to the plaintiff, as provided in the act, to remove its poles and wires from the streets, and place its electrical conductors in such subways. Having refused to comply with such notice and with the provisions of the act, the commissioner of public works of the city caused the poles to be cut down and the wires to be removed from the streets; and this is what the plaintiff complains of.

Its property was not taken for public use; it was simply removed from the streets, where it had become a nuisance, and the public authorities had the same right to remove it from the streets, doing no unnecessary damage, that it had to remove any other encumbrance therefrom. After the passage of the acts referred to, and the building of the subways, and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the streets. They were then there without authority, and thus became a nuisance, and hence the public officials had the right to remove them. It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense. But the same is true of railroads occupying streets; they cannot change from one style of rail to another, nor from one place in the street to another, nor make a change of grade without a considerable expense; and yet the mere fact that they are subjected to expense is no answer to the right of the public, in pursuance of law, to require them to comply with the prescribed regulations.

If the authority did not otherwise exist to require these poles and wires to be removed from the streets, it could be found in section 5 of the act of 1848, in which is contained the authority to construct telegraphic lines upon public roads and highways, with the proviso that the same shall not be "so constructed as to incommode the public use of such roads

or highways." Who shall judge whether they incommode the public use of the streets? It is unquestioned that they do, and the legislature has determined that fact; and when the plaintiff maintained its wires and poles in the streets in such a manner as to incommode the public use of the streets, the legislature had the right to provide that they should put them under the streets, so that the streets above the surface could be devoted to the public uses for which they were intended.

The plaintiff seeks to strengthen its position in reference to the use of the streets of the city of New York, under the laws of the United States, to which we will make brief reference. It is provided in section 5263 of the Revised Statutes of the United States, that "any telegraph company now organized, or which may hereafter be organized, under the laws of any state shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." Section 5268 provides that "before any telegraph company shall exercise any of the powers or privileges conferred by law, such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by law." Section 3964 provides that all letter-carrier routes established in any city or town for the collection and delivery of mail matters are post-roads; and by the act approved March 1, 1884, it is enacted that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post-routes." The plaintiff filed the written acceptance with the postmaster-general, required by section 5268.

The precise scope and range of operation of these sections within a state are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the state, except under regulations prescribed for the control of all telegraph companies within the state, nor could such companies interfere with streets and

highways in the state so as materially to impair their usefulness as ordinary highways. Nor could these Congressional acts deprive the state of its control over its highways and its right to regulate their use under the police power for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself to place its electrical conductors in the subways constructed beneath the surface of the streets.

We have carefully scrutinized the contract entered into by the board of electrical control with the defendants, the Consolidated Telegraph and Electrical Subway Company, and we find nothing in its provisions unreasonable or impractical; and the power of the legislature to authorize such a contract, and to confirm it when made, is beyond doubt. These acts of 1884, 1885, and 1887 have been under consideration in several cases, and have uniformly been upheld and enforced: *People ex rel. v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893; 1 N. Y. St. Rep. 633; *United States Illuminating Co. v. Hess*, 19 N. Y. St. Rep. 883; *United States Illuminating Co. v. Grant*, 27 N. Y. St. Rep. 767; *Western Union Tel. Co. v. Mayor etc.*, Opinion by Wallace, J., in U. S. C. C.

We are therefore of opinion that the judgment should be affirmed, with costs.

HIGHWAYS — TELEGRAPH COMPANIES. — The right of the telegraph company to use a highway for its poles is subject to the public user: *Sheldon v. Western Union Tel. Co.*, 121 N. Y. 697. Telegraph poles in public streets, and proceedings to abate the same, see note to *McCormick v. District of Columbia*, 54 Am. Rep. 290-293. Compare *Julia B. Asa's v. Bell T. Co.*, 88 Mo. 258; 57 Am. Rep. 398, and note 409-412.

CASES
IN THE
SUPREME COURT
OF
OHIO.

STATE v. ELLET.

[47 OHIO STATE, 90.]

CONSTITUTIONAL LAW, WHEN MANDATORY.—A constitutional provision that "all laws of a general nature shall have a uniform operation throughout the state" is mandatory, and not directory merely.

CONSTITUTIONAL LAW.—WHETHER STATUTES ARE LAWS OF GENERAL NATURE, or not, depends upon their subject-matter, and not upon their form.

CONSTITUTIONAL LAW—LAW GENERAL IN FORM, BUT LOCAL IN APPLICATION, VOID.—A law general in form and purporting to apply to all counties of a designated class, and to establish for them a general system of law regulating the custody, investment, and disbursement of their public funds and revenues, but which in fact can never operate but in one county in the state, is local and void as being in conflict with the constitutional provision that "all laws of a general nature shall have a uniform operation throughout the state."

Quo WARRANTO.—It was alleged in the petition that the defendants, as commissioners of Summit County, usurped, assumed, and exercised the power to loan the money that was or might be in the county treasury of that county. The defendants, in their answer, alleged that as such commissioners they are exercising such power under and by virtue of an act of the general assembly. The state demurred to the answer, claiming that the statute was unconstitutional.

Oviatt and Allen, Voris and Voris, and D. K. Watson, attorney-general, for the petitioner.

George W. Lieber, prosecuting attorney, and Powell, Owen, Rickets, and Black, for the respondents.

WILLIAMS, J. The particular provision of the constitution with which the statute is claimed to be in conflict is section 26 of article 2, which requires that "all laws of a general nature shall have a uniform operation throughout the state."

This provision of the constitution, it has been uniformly

held by this court, is mandatory, and not directory merely: *Kelley v. State*, 6 Ohio St. 269; *Ex parte Falk*, 42 Ohio St. 638; *State v. Powers*, 38 Ohio St. 54, 63. In the language of Scott, J., in *Kelley v. State*, 6 Ohio St. 269, it is "a general, unqualified, and positive prohibition or limitation of legislative power, forbidding the giving of a partial operation to any law of a general nature, or in its own affirmative terms, requiring that a uniform operation throughout the state shall be given to all laws of a general nature."

The purpose of the provision, and the evils intended to be remedied by it, have been repeatedly declared and pointed out in the decisions of this court. In *Lehman v. McBride*, 15 Ohio St. 605, it is said that, "under the former constitution, laws having a general subject-matter, and therefore 'of a general nature,' were frequently limited expressly, in their operation, to one or more counties, to the exclusion of other portions of the state. As a consequence, on the same subject there might be one law for Hamilton County, another for Franklin, and still a third for Ashtabula. This naturally led to improvident legislation, enacted by the votes of legislators who were indifferent in the premises, because their own immediate constituents were not affected by it. To arrest, and, for the future, prevent this evil, the provision in question was inserted in the present constitution." Upon this subject it was said by Boynton, J., in *McGill v. State*, 34 Ohio St. 228, that "a general law that land should not be sold upon execution for less than two thirds of its appraised value was excluded from operation in several counties by local enactment. There were different laws in different counties respecting the descent and distribution of intestate property. Some statutes defining legal offenses were excluded in their operation from a large part of the state; and different penalties for a violation of the same act were, in some instances, provided for different localities. These are examples of the legislation, to prevent which in the future, and the mischief resulting from it, this provision of the constitution was adopted." And see *Ex parte Falk*, 42 Ohio St. 638.

Whether a statute be a law of a general nature, or not, depends, it is conceded, upon its subject-matter, and not upon its form; and hence, to come within this constitutional inhibition, it is not necessary that the statute be general in form. Nor can it be maintained that because the act is local in form, it must be presumed that there was some sufficient local ne-

cessity for its enactment; for this would totally defeat the provision of the constitution. If it must be assumed, merely because the statute has been enacted, that the legislature had information showing that there was a necessity for such legislation with respect to the particular locality, it would follow that all legislation local in form, must be upheld, however general the nature and subject-matter of such legislation might be. Speaking upon this subject, Okey, J., in the opinion in *Ex parte Falk*, 42 Ohio St. 638, says: "We are not willing, nor are we permitted, to adopt any such rule of construction; and indeed to do so would be in effect to unsay what we have deliberately said as to the mandatory character of the constitutional provision we are considering."

The statute in question purports to be general, applying to all counties of a designated class, and to establish for them a general system of law regulating the custody, investment, and disbursement of their public funds and revenues. But it is admitted by the answer that Summit is the only county in the state coming within the description of the statute, and hence the only one to which it can apply. And inasmuch as no other county can ever come within the operation of the statute, there is no ground for the application of that rule of classification under which legislation applicable to classes of municipal corporations into which others may enter or be admitted by the increase of population has been frequently sustained by this court: *State v. Anderson*, 44 Ohio St. 247.

The act, in substance, provides that the county commissioners shall, in a specified mode, contract with one or more banking institutions, incorporated under the laws of this state or of the United States, for the loan of the public money in the county treasury, at a rate of interest not less than two per centum, and that the county treasurer, upon receiving written notice from the commissioners that such contract has been awarded, naming the bank selected as such depository, shall deposit in such bank, to the credit of the county, all moneys in his possession, and thereafter, daily, in like manner, deposit all moneys received by him on the preceding business day. These contracts for loaning the money are required to be renewed, or new ones made, every six months and provision is made for removing the money from the possession of the last to that of the succeeding borrower. The money so deposited shall bear interest at the rate agreed upon, to be computed on the daily balances, "and such inter-

est shall be placed to the credit of the county on the first day of March and September each year, or at any time when the account may be closed." The act then points out in detail the mode of disbursing the funds by the depositary upon checks drawn by the treasurer, the duties of the auditor and treasurer with respect thereto, and prescribes an elaborate method for keeping the fiscal accounts and preserving the vouchers. Under one of its provisions, the treasurer may retain in his custody funds not exceeding five thousand dollars with which to pay jurors and witnesses their fees and warrants payable from the soldiers' relief fund.

The subject of the statute is the custody, safe-keeping, and disbursement of the public revenues, and the duties of public officers concerning them. Included in these revenues are the moneys collected on the levy for the payment of the interest and principal of the public debt of the state, the general revenue fund, the state common-school fund, money collected from the tax on the business of trafficking in intoxicating liquors, a portion of which goes into the revenues of the state, taxes levied for defraying county expenses, repairing roads and bridges, and keeping the poor, as well as those collected upon special levies for school, county, township, and municipal purposes, and all other public money, from whatever source derived, coming to the hands of the county treasurer. In the safe-keeping and proper disbursement of these funds are involved the credit of the state, the due administration of the state government, the efficiency of the common-school system, the proper maintenance and management of the benevolent and penal institutions, and other matters of public concern in which the tax-payers and people of the state at large have important if not equal interests.

Hitherto the whole subject of keeping and disbursing as well as raising the public revenues has been regarded of such common interest to all the people of the state that it has been regulated by a general law operating uniformly throughout the state. County treasurers are required to be elected in the several counties, and they hold their office, for the same terms. They are, in their respective counties, made the collecting and disbursing officers of the public revenues. The same general duties are enjoined upon them, in the discharge of which the same legal machinery is employed, and the performance of which are secured and enforced in the same manner. The county commissioners are "required to provide all such

rooms, and fire and burglar proof vaults and safes, and other means of security in the office of the county treasury, as are necessary for the perfect protection of the public moneys and property therein": R. S., sec. 859. The treasury is subject to frequent examinations, with or without notice to the treasurer, and severe penalties and forfeitures are imposed for his delinquency or malfeasance. He is required at prescribed periods to make settlements with the state auditor, and pay over to the state treasurer all money belonging to the state.

It is claimed, however, that statutes local in their application are not necessarily invalid because there is a general statute in force, under the provisions of which the same object may be accomplished that is sought by the local statute, and embracing the same subject-matter. This may undoubtedly be true, but the local statute must be upon a subject in its nature local, as well as local in its operation. Such was the statute under review in *State v. Shearer*, 46 Ohio St. 275.

That act was one to establish a special school district, comprising certain described territory in a specified township. The general statutes in force at the time provided a mode for the creation of special districts. The decision of the case is placed upon the ground that the subject-matter of the statute was local in its nature, and was so treated by the general legislation pertaining to the subject.

With respect to the general statute upon the subject, Spear, J., in the opinion, says: "The idea pervading the statute as to this feature is, that the needs of the people of the different townships will be different; that while in one the education of the youth may be reasonably attained by constituting the whole territory into one district, in an adjoining township the same object can be better attained by dividing the territory into subdistricts, or by carving out of the territory of the township a portion into a special district, or, by reason of changed conditions, by the consolidation of subdistricts. This implies that the question of whether territory in a given locality shall be formed into one kind of a district, or another, will be determined by considerations of local convenience, and that no division by a rule which shall be fixed, arbitrary, and uniform will meet the requirements of all sections. It is foreseen that changes will be necessary from time to time, and power is given to boards of education to initiate such changes, and the same may be brought about in any of the several localities without reference to or disturbance of neighboring

districts not geographically affected, or the schools within them. Clearly, then, in the judgment of the framers of the general law, divisions of territory into districts is matter of local concern." In the same opinion it is further said: "The question of division of territory, like that of the erection of school-houses, and the procuring of apparatus and other property necessary for the use of the schools, would seem to be so far of local concern merely that special necessities might safely be left to be provided for by special enactments."

It is apparent that the general statutes relating to the custody and disbursement of the revenues do not contemplate any local conditions permitting the removal of the public moneys from the custody of the county treasury as the place of their deposit and safe-keeping, nor that they should be held and paid out otherwise than by the treasurer. These regulations are not founded upon any considerations merely local, nor is the subject local in its nature, but, as we have already seen, is of general public interest. What local circumstance or condition can there be with respect to the subject in any county that does not also exist in every other county? Or what considerations are there rendering the application of this particular statute, adopting such radical changes, necessary or advisable in Summit County, that do not make it equally necessary or advisable in each of the counties of the state? It is not contended that there are any, and none are perceived. If it be said that a safe place of deposit in the county treasury has not been provided, or that it has become temporarily unsafe, or that the incumbent of the office is incompetent or unfaithful, the same condition of things is liable to occur in other counties, and as much so in one as another; for the same requirements are made by law for providing Summit County with a safe place for the deposit of the public money in the treasurer's office, as are for every other county, and in each county the same regulations are in force for choosing the officer, securing and enforcing the performance of his duties, detecting and punishing his defalcations, and for removing him from office, and filling the vacancy. If such conditions should exist in any county, they must in their nature be temporary. In view of the law, it can hardly be supposed that the treasurer's office has not been furnished with the necessary vaults or places for the safe deposit of the public funds; and if such vaults or places have been destroyed or become unsafe, the duty of the county commis-

sioners is imperative to at once restore them, and make them safe. Unfaithfulness on the part of public officers is exceptional, integrity and competency the rule. Official misconduct is therefore not to be presumed, and generally, when it occurs, measures are promptly taken to prevent its continuance or recurrence. Obviously, the statute, which the defendants claim confers upon them the powers and franchises they are charged with exercising, was not adopted to meet merely temporary or local emergencies or conditions. It enacts for Summit County a permanent and comprehensive system of law relating to the custody and disbursement of the public funds not only essentially different from that established for the remainder of the state by the general statutes, but directly at variance with it. It is the experiment of a new scheme, general in its nature, and local only in its application. It strips the present and each succeeding county treasurer of many of the important functions of his office, and makes him little more than a mere conduit for the transmission of the public moneys from the hands of the tax-payers, and other sources of revenue, to the bank selected as the depository. It changes the place of their safe-keeping, removes the safeguards provided for their security and the protection of the public, and substitutes for them others wholly different, and changes the whole method of disbursement and the system of fiscal accounts.

We are not to be understood as calling in question the wisdom or policy of the statute. The system it provides for the safe-keeping and disbursement of the public money of Summit County may be, in every way, a better one than that established by the general statute. But if it be so for Summit County, it must likewise be so for every other county; for the conditions that make it so exist in each alike.

Then the effect of this statute, if valid, is to give partial operation to the criminal laws, and prevent their uniform operation throughout the state.

The criminal code (R. S., sec. 6841) makes it a felony for any person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state, or to any county, township, municipal corporation, or board of education in this state, to loan, with or without interest, to any company, corporation, or individual, or to deposit with any company, corporation, or individual, any portion of the public money, or

any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him, for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose. And the offender may be imprisoned in the penitentiary for a term of years, and heavily fined.

Any county treasurer who should deposit the public moneys in any bank, with or without interest, and whether so directed by the county commissioners or not, would be guilty of a violation of this section, and subject to the punishment it prescribes. And if the county commissioners should advise and direct such deposit to be made, they would be equally guilty. It is sought to take Summit County and its officers out of the operation of this section, and relieve the latter from the consequences of its violation by section 18 of the statute in question, which enacts that "any provision of the statutes of this state in force when this act takes effect which conflicts with any provision of this act shall be held to be superseded by the latter, as to the matter of inconsistency, and not otherwise, in counties to which this act relates."

The penal part of that statute is contained in section 17, which provides that "an officer of any such county who willfully violates any provisions of this act, or willfully neglects or refuses to perform any duty thereby imposed upon him, shall, upon conviction thereof in the court of common pleas, be fined in any sum not exceeding ten thousand dollars, for the use of the county, or be imprisoned in the penitentiary not more than ten years nor less than one year, or both, at the discretion of the court."

Thus it appears, if effect be given to this statute, that while it is a felony for the treasurer of any county, except Summit, to deposit the public moneys in a bank, or for the commissioners to advise or direct such deposit to be made, it is perfectly lawful for the treasurer of Summit County to deposit the public moneys of that county in banks, and for the commissioners to advise and direct the same to be done. Not only so, but in that county the refusal of the treasurer to make the deposit, or of the commissioners to select the bank and direct the deposit, is made a felony. In other words, under the operation of this statute, acts which in one county are innocent, and the faithful performance of official duty, are made grave crimes if done in any other county; and on

the other hand, that which is innocent, and the faithful performance of official duty in the latter, is a crime of equal gravity in the former. It cannot be claimed that these highly penal provisions are merely police regulations. Whether, therefore, the same act be lawful or criminal is made to depend upon the boundary of a county line. This would be a somewhat singular state of the law; at least, it is that state of legislation which, as already seen, according to the former decisions of this court, the particular provision of the constitution we have been considering was designed to interdict.

We are therefore of opinion that the statute upon which the defendants rely as the source of their authority for the powers and franchises they have assumed to exercise is a law of a general nature, applicable only to Summit County, there being no other county having the specified population and containing a city of the designated class and grade, and is in conflict with section 26 of article 2 of the constitution of this state, which requires that "all laws of a general nature shall have a uniform operation throughout the state."

Demurrer to answer sustained, and judgment of ouster.

GENERAL LAW, WHAT IS. — This subject, arising under constitutional provisions prohibiting the legislature from passing special laws where general laws can be made applicable, and requiring that all laws of a general nature shall have a uniform operation throughout the state, has been prolific of litigation, and is important and interesting, in view of the many nice distinctions indulged by courts in attempting to uphold the validity of statutes, without at the same time ignoring such constitutional requirements. These constitutional provisions are mandatory to the legislature, and compliance with them is necessary to the validity of legislation. Whether a particular act conforms thereto or not is a judicial question, with one exception, and that exception is, whether or not a general law can be made applicable to the subject-matter included within the operation of the statute under consideration. This is exclusively a legislative and not a judicial question: *Ex parte Falk*, 42 Ohio St. 638; *State v. Powers*, 38 Ohio St. 54.

Laws of a general nature, then, as distinguished from special laws, are those which relate to subjects of a general nature, and deal generally with them. The above-mentioned constitutional requirement involves the question of what is such a subject, and how comprehensively it must be treated in legislative acts. All laws to which such requirements are applicable must be so framed as to have a uniform operation throughout the state, else they will be unconstitutional and void. Under these constitutional provisions, a law which applies only to an individual, or to a number of individuals selected out of a class to which they belong, is a special law: *State v. California Min. Co.*, 15 Nev. 234.

A general law is one which relates to or binds all within the jurisdiction of the law-making power, limited as that power may be by its territorial operation or by constitutional restraint. A law is not general in any cor-

rect sense of the term, but is special, where it is suspended in one locality, where exists a proper subject-matter on which to operate, but remains in full force and vigor in another locality of exactly the same kind, or which in the same locality is or is not law, as shall suit the changing fancies of that locality: *People v. Cooper*, 83 Ill. 585.

In considering these prohibitions of the constitution, regard must be had to the substance, not the mere form given to the enactment, as determining its constitutionality. If the act must necessarily produce a result clearly forbidden by the constitution, it cannot be upheld, whatever its form or profession: *Kelley v. State*, 6 Ohio St. 269; *People v. Cooper*, 83 Ill. 585.

The meaning of the constitutional provision that all laws of a general nature shall have a uniform operation is, that every law shall have a uniform operation upon all the citizens, persons, or things of any class upon which it purports to take effect, and that it shall not grant to any person or class of persons privileges which, upon the same terms, shall not equally belong to all persons: *Brooks v. Hyde*, 37 Cal. 368. Uniform, in this sense, does not mean universal, but simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law; in other words, all the facts of whose cases are substantially the same: *People v. Judge*, 17 Cal. 547.

Under this construction, the constitution does not require that the operation of laws throughout the state shall be uniform in any other sense than that their operation shall be the same in all parts of the state, under the same circumstances and conditions: *Groesch v. State*, 42 Ind. 547-560, where the court said: "It is only in a qualified sense that any law can be said to be of uniform operation in all parts of the state. A law for the punishment of crime the provisions of which are alike applicable to all parts of the state must necessarily lack uniformity in one sense in its operation, not only as to persons, but also as to localities. It operates in those places where its provisions are violated, and upon those persons who transgress them. Under the same circumstance and condition its operation is uniform. The law which affords civil remedies is uniform in its provisions, and, under the like circumstances, is uniform in its operation throughout the state. It is not required that every man shall resort to that remedy, or that in each locality there shall be the same number, or any number, of persons who shall resort to the remedy, in order to make the law uniform in its operation in the sense in which the terms are used in the constitution. Such is the case, under all circumstances, when one or more persons are by law required to do some act or acts upon or in consequence of which the law is to operate."

A law which relates to a certain relation or condition, and operates upon all standing in that condition or relation, is a general and not a special law, within the meaning of the constitution, as uniformity is attained by its operation upon all persons in like condition: *Iowa R. R. Land Co. v. Soper*, 39 Iowa, 112. So an act which applies to and embraces all of a class of persons who are or may come into like situations or circumstances is a general law: *Phillips v. Missouri Pacific R'y Co.*, 86 Mo. 540; and is sufficient as to uniformity: *McAulick v. Mississippi etc. R. R. Co.*, 20 Iowa, 338. A statute which relates to persons or things as a class is a general law, while one which relates to particular things or persons of a class is special: *Ewing v. Hoblitzelle*, 85 Mo. 64; *Wheeler v. Philadelphia*, 77 Pa. St. 338. An act, to be general in its scope, need not include all classes of individuals in the state, for it answers the constitutional requirements if it relates to and operates uniformly upon the whole of any single class: *Abel v. Clark*, 84 Cal. 226. So a law framed

in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is a general law: *State v. Parsons*, 40 N. J. L. 123; 29 Am. Rep. 210; *State Board of Assessors v. Central R. R. Co.*, 48 N. J. L. 146.

In *Randolph v. Wood*, 49 N. J. L. 88, it was said that "a law is to be regarded as general when its provisions apply to all objects of legislation, distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class."

On the other hand, an act may be special where it applies to many particular and existing persons or things, as well as where it applies to one only; or it may be special when it simply describes such particular persons or things so that they may be known, as well as where it gives their particular names or distinctive appellations: *City of Topeka v. Gillett*, 32 Kan. 431; *State v. Wilcox*, 45 Mo. 458.

In *Nichols v. Walter*, 37 Minn. 270, it was said: "It must be conceded that where a general law, uniform in its operation, is required, the law is none the less general and uniform because it divides the subjects of its operation into classes, and applies different rules to different classes. For the purpose of efficient and beneficial legislation, it is often necessary to do so. The question of the extent to which it may be done without running into special legislation is a difficult one. It is difficult, and perhaps not quite safe, to state any inflexible rule. With respect to political subdivisions of the state, counties, cities, or towns, the supreme court of Pennsylvania lays it down that the only proper classification is by population. We are satisfied that rule is altogether too narrow. For instance, laws for incorporating villages or granting corporate powers or privileges, except to cities, must be general and uniform in their operation throughout the state. But villages lying on rivers might require, from that situation, powers and privileges not necessary to villages inland. Now, a general law for the incorporation of villages that conferred such powers and privileges on such villages, but not on inland villages, if it operated upon all villages alike in that situation, could hardly, for that reason, be called special legislation. The difference in the situation of such villages might furnish a basis for classifying them for the purpose of conferring the powers and privileges rendered necessary or proper by their situation. The authorities are agreed that a law general in form, but special in its operation, violates a constitutional inhibition of special legislation as much as though special in form; and they are also agreed that, for the purpose of applying different rules to different subjects, the legislature cannot adopt a mere arbitrary classification. To permit that would open the door to a complete evasion of the constitution. Thus in *Commonwealth v. Patton*, 88 Pa. St. 258, the law was general in form, but in fact it could apply to only one county in the state, and never, whatever changes might come, could apply to any other. It was held to be special legislation. In *Devine v. Commissioners*, 84 Ill. 590, the law, by its terms, applied to all counties in the state having more than a specified population. As there was but one county in the state having that population, the court held it to be a mere device to evade the constitutional provision prohibiting special legislation. In *State v. Mitchell*, 31 Ohio St. 592-607, the law was general in form, and applied to cities of the second class having a population

of over thirty-one thousand at the last federal census. There was but one city in the state that answered the description, and the court said: 'The effect of the act would have been precisely the same if the city had been designated by name, instead of by the circumlocution employed.' These cases, cited from many on the subject, are sufficient to show that in determining whether a law be general or special courts will look, not to its form and phraseology merely, but to its substance and necessary operation. A law is general and uniform in its operation which operates equally upon all the subjects within the class of subjects for which the rule is adopted; but, as we have said, the legislature cannot adopt a mere arbitrary classification, even though the law be made to operate equally upon each subject of each of the classes adopted. . . . The principle adopted by the supreme court of New Jersey comes more nearly to what we regard the true principle of classification than that stated by any other court. We quote again from *State v. Hammer*, 42 N. J. L. 435: 'But the true principle requires something more than mere designation by such characteristics as will serve to classify. For the characteristics, which thus serve as the basis for classification, must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation. Or to state it differently, though not so well, the true, practical limitation of the legislative power to classify is, that the classification shall be upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation in respect to them.'

Again, in *State v. Spande*, 37 Minn. 323, it was said: "A law, to be general, need not operate alike upon all the inhabitants of the state, or on all the cities or all the villages in the state. To require that would be utterly impracticable. A law is general which operates alike upon all the inhabitants, or all the cities, or all the villages, or other subjects of a class of such subjects of legislation. That, for the purpose of legislation, it may be necessary to make, and that the legislature may make, such classification is undoubted."

A statute relating to persons or things as a class is a general law. One relating to particular persons or things of a class is special: *Wheeler v. Philadelphia*, 77 Pa. St. 338. Hence a statute which creates a new class of municipal corporations, and leaves nothing to option or discretion as to its operation in creating the new class, and which imposes like duties and bestows like powers upon each municipality of the new class, is a law of uniform operation: *Lake v. State*, 18 Fla. 501. Thus a law relating to street improvements, and affecting all municipalities in the state alike, is general: *Thomason v. Ashworth*, 73 Cal. 73. For the purposes of legislation, cities may constitute a class, and a law applicable to cities only may be general and constitutional: *In re Commissioners*, 49 N. J. L. 488. And all that is required of such law, in order that it may be uniform, is, that it equally affect all cities in like situations: *Haskel v. Burlington*, 30 Iowa, 232; *State v. Wilcox*, 45 Mo. 458. Accordingly, a law which confers upon all cities, not then possessing it, power to sell personal and real property for delinquent taxes, is general and uniform: *Haskel v. Burlington*, 30 Iowa, 232. And a statute

for the assessment and collection of taxes which applies to all incorporated cities and towns in the state is general: *People v. Wallace*, 70 Ill. 680. And such law is valid, although there may be municipal corporations to which it is not applicable because of their existence under special charters, which have not been changed since the adoption of the constitution: *Potvin v. Johnson*, 108 Ill. 70. So an act regulating the police departments in all the cities of the state, and declaring that no policeman in any city in the state shall be removed except for cause, is general: *Mayor etc. of New Brunswick v. Fitzgerald*, 48 N. J. L. 457; *Fitzgerald v. New Brunswick*, 47 N. J. L. 479; 54 Am. Rep. 182.

The legislature has power to classify cities and municipal corporations according to population, and then legislate for each class, and the courts will not interfere with the manner of classification: *People v. Henshaw*, 76 Cal. 436; *Pritchett v. Stanislaus Co.*, 73 Cal. 310; *Marmet v. State*, 45 Ohio St. 63. In fact, the extreme doctrine is announced in *Commonwealth v. Patton*, 88 Pa. St. 258, that there can be no proper classification of cities or counties except by population, and that geographical distinctions cannot be resorted to without entering the domain of special legislation. And while population may be made the basis of classification in statutes relating to cities and their police powers, such classification must be based upon some substantial reason, and cannot be made the means of evading the constitutional interdict of local or special laws, where the classification is plainly illusory: *State v. Hoagland*, 51 N. J. L. 62.

A distinction is to be observed between classification which is merely illusory and that which is of such a nature and founded on such qualities or characteristics as makes the object to which the legislation applies a distinct class by itself: *State v. Mayor etc. of New Brunswick*, 42 N. J. L. 51.

Where cities have been classified by law, legislation to cure irregularities in the construction of sewers in cities of the first class is general: *Mason v. Spencer*, 35 Kan. 512; and so is an act for this purpose relating to cities of more than thirty thousand and less than fifty thousand inhabitants: *Rutherford v. Hamilton*, 97 Mo. 543; *Rutherford v. Heddens*, 82 Mo. 388. So is an act to regulate the registration of voters and of elections in cities having a population of more than one hundred thousand inhabitants: *Boeing v. Hoblitzelle*, 85 Mo. 64. So is a local-option act which applies to all counties in the state as a class, and to all incorporated cities or towns as a class which have a population of twenty-five hundred or more: *State v. Pond*, 93 Mo. 606. So is a law authorizing cities containing more than twenty thousand and less than two hundred and fifty thousand inhabitants to extend their limits: *Kelly v. Meeks*, 87 Mo. 396. So is a law fixing the salary of judges of criminal courts in cities having a population of forty thousand: *State v. Reitz*, 62 Ind. 159. So legislation is general which applies to all cities of the third class, or to any city of less than ten thousand inhabitants which may except it: *Reading v. Savage*, 124 Pa. St. 328; or which operates only upon all cities of the first class having at the last federal census less than one hundred thousand inhabitants: *Welker v. Potter*, 18 Ohio St. 85; or an act providing for a police force in cities of the first grade of the first class: *State v. Hudson*, 44 Ohio St. 137.

In *State v. Hawkins*, 44 Ohio St. 108, it was said: "It is now too well settled by the decisions of this court to be called in question that legislation may be adapted to the different classes into which the municipal corporations of the state have been classified, without violating the provision of the constitution. The distinction is this: that a law applying to a certain class of

cities, fixed by previous legislation, into which other municipal corporations may enter, and from which they may pass into other classes, by increase of population, is not special, but general, since the grade of any particular city is not designated by the act, but depends upon its growth in population, as it may, by such growth, pass from one grade or class to another."

Laws public in their objects may be confined to a particular class of persons, if they are general in their application to the class to which they apply, and the distinction is not arbitrary, but rests on some reason of public policy. Hence an act is not special legislation merely because its provisions apply only to publishers of newspapers: *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707. Nor is an act which provides a method for foreclosing mortgages under powers and exempting from its operation mortgages which have been foreclosed or which have been attempted to be foreclosed: *Cobb v. Bord*, 40 Minn. 479.

An act, to be general in its scope, need not include all classes of individuals in the state, and it answers the requirement of the constitution if it relates to and operates uniformly upon the whole of any class. Hence an act providing for the vaccination of all children attending the public schools, and for the exclusion of unvaccinated children therefrom, is valid: *Abeel v. Clark*, 84 Cal. 226.

A general law, unlimited as to time in its operation, is not obnoxious to a constitutional inhibition against special legislation because but one city of a class has the population necessary to come within its purview: *Darrow v. People*, 8 Col. 417; *Ex parte Wells*, 21 Fla. 280; *State v. Graham*, 16 Neb. 74. Cities may be classified according to population, and the fact that some of these classes contain each but one city does not make such classification invalid or bring it within the constitutional prohibition against special legislation: *Kilgore v. Magee*, 85 Pa. St. 401.

The fact that a law is applicable to one or more, but not to all, of the classes into which cities may be divided, does not render it special legislation. Accordingly, an act providing for police courts in cities having thirty thousand and under one hundred thousand inhabitants is not special: *People v. Henshaw*, 76 Cal. 436. And a statute repealing, generally, all acts appointing commissioners to regulate municipal affairs in general is not special because of the fact that there is but one commission to which it can apply: *State v. Parsons*, 40 N. J. L. 123; 29 Am. Rep. 210. While a law classifying cities according to population, or otherwise, may, when enacted, affect but one city in the state, it will generally not be held unconstitutional for that reason, if other cities of the state may reasonably be expected to fall within the class within a time during which the act, if not repealed, may operate.

Under the rule that it is not the form which a statute is made to assume, but its operation and effect, which are to determine its constitutionality, it is generally maintained that a law, general in form, legislating for a city of a certain class, or containing a certain population, and which cannot by any possibility become applicable to any other city or cities, is special, as much as though each city were legislated for by name. Hence if the classification adopted is that of population at the passage of the statute, or at some prior time, or if, though the test of population is not expressly referred to any particular date, the statute is to operate for a limited period, during which no city of the state can reasonably be expected to change in population so as to come within the classification, the statute is unconstitutional: *Devine v. Commissioners*, 84 Ill. 590; *State v. Mitchell*, 31 Ohio St. 592. This rule was applied in *Skute v. Hammer*, 42 N. J. L. 440, where the court said: "Plainly, a law may

be general in its provisions, and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such law may be in contravention of the constitutional inhibition. Thus a law enacting that in every city in the state in which there are ten churches there should be three commissioners of the water department, with certain prescribed duties, would present a specimen of such law, for it would sufficiently designate a class of cities, and would embrace the whole of such class, and yet it does not seem to me that it could be sustained by the courts. If it could be so sanctioned, then the constitutional requirement would be of no avail, as there are but few objects that cannot be arbitrarily associated, if all that is requisite for the purpose of legislation is to designate them by some quality, no matter what they may be, which will so distinguish them as to mark them as a distinct class. But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such nature as to mark the objects thus designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation, and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation. Principles of this sort can be best elucidated by example. I have already given an example of a merely arbitrary classification founded on no casual relation between the subject-matter of such legislation and the things so classified. A sample of the other or legitimate kind would be signified in a law that would give to all cities in the state situated on tide-water the privilege of using such waters in connection with their sewers. In such an enactment but a part of the cities of the state would be embraced, but the classification would be lawful and proper, inasmuch as the places embraced would be possessed of a characteristic, being of such a nature as to afford a reasonable ground for such special legislation. In the two classes of cases thus exemplified, the basis of the classification of the one would be by a reference to marks of distinction having no connection with the substance of the supposed statute; in the other, the opposite of this would obtain, so that in the former the classification would be formal and arbitrary, in the latter, substantial, and springing out of the nature of the subject of this legislation. The present law is seemingly of the former kind. The class to which it is made applicable is designated and selected by the mark of each of its members, being possessed of a certain kind of board of officers, — a circumstance having no connection but a formal one with the subject-matter of this law, and in no way indicating a reasonable ground for making these particular places the object of such special legislation. In all but mere form, as I have said, these places might as well have been designated by name as by a reference to these organic bodies possessed by them, and the effect of this law would have been precisely the same." These principles were applied and affirmed in *State v. Trenton*, 42 N. J. L. 486; *State v. Gaddis*, 44 N. J. L. 363; *Hammer v. State*, 44 N. J. L. 667. So an act which regulates the salaries of certain city officers, but which is, and always must be, applicable to but one city, is special: *Coutieri v. Mayor etc. of New Brunswick*, 44 N. J. L. 58; *Topeka v. Gillett*, 32 Kan. 431.

Of a statute general in form which could only apply to one city, the court said, in *State v. Anderson*, 44 Ohio St. 248: "The statute is not to apply to

any cities that may at any time hereafter have the population named; it applies only to such as had this precise population at the last federal census, and thereby, instead of classifying the city of Akron, it is taken from the class to which it belongs under the general statute classifying the cities of the state, and clothed with certain corporate powers not possessed by any city of its class." And in *State v. Pugh*, 43 Ohio St. 112, the court said: "Although it is admitted that no other city than Columbus is within, or can be before July next come within, the class and grade contemplated by the act, yet if any other city may in the future, by virtue of its increase in population and the action of its municipal authorities, ripen into a city of the same class and grade, and come within the operation of the act, it is still a law of a general nature, and not invalid, even if it confer corporate powers. On the other hand, if it is clear that no other city in the state can in the future come within its operation without doing violence to the manifest object and purpose of its enactment and to the clear legislative intent, it is a special act, however strongly the form it is made to assume may suggest its general character." So where a statute named cities containing a certain population, and then provided that "the office of any notary public in such a city holding a commission bearing date prior to the passage of this act, and whose term of office as such notary public has not expired at the time this act becomes a law, shall be abolished at the expiration of ten days after the taking effect of this act," it is special and void. The court said: "In the case at bar, it is simply impossible for the act to ever operate except upon an existing state of facts, except as to particular persons of a class, and that class residents of a certain city, to wit, St. Louis. Its operation is centered upon those persons, and ceases when they are ousted according to its terms. The section in question may be a general law in form, but courts of justice cannot permit constitutional prohibitions to be evaded by dressing up special laws in the garb and guise of general statutes": *State v. Herrman*, 75 Mo. 340. A law which groups certain cities for a special purpose, namely, to confer on some a power of funding debts not granted to others, is special and void: *State v. Trenton*, 42 N. J. L. 486.

The legislature may pass laws affecting only certain localities and classes, while an act excepting certain persons or things from an exemption granted to others of the same class in the same territory is special, and void: *Utney v. Hiott*, 30 S. C. 360; 14 Am. St. Rep. 910. In *Weinman v. Wilkesburg etc. R'y Co.*, 118 Pa. St. 201, the court said: "The title of the act of 1879 under which the defendant company was organized is as follows: 'An act to provide for the incorporation and for the government and regulation of street-railway companies now incorporated, or which may hereafter be incorporated, in cities of the second and third class in this commonwealth.' Its provisions follow the title, and relate only to the incorporation, government, and regulation of street-railway companies in cities of the second and third class. The subject of this statute is therefore street-railway companies, which is a subject for general legislation, while the statute professes to deal only with a limited number of these railways, and these are selected by reference to their location in certain cities. Under the guise of a general law, we have here one which is special, because it relates to a few members of the general class of corporations known as street-railway companies, and local, because its operations are confined to particular localities, viz., cities of the second and third class. The provisions of the constitution which forbid local and special legislation cannot be brushed aside so easily. It is urged that this statute is sustainable under the decisions of this court recognizing the power

of the legislature to classify the cities of the commonwealth for purposes of municipal government; but those cases rest upon a very different principle from that involved in the present case. For purposes of local government, the state is subdivided into counties, townships, and other municipal and quasi municipal corporations. Each class of these subdivisions has purposes to subserve that are peculiar to it, and needs to be invested with the powers necessary to that end. Generally speaking, all the members of each class have the same local functions to perform. Classification, therefore, upon this basis has been recognized, and a statute relating to all the townships, all the school districts, or all the members of any particular class of the municipal divisions of the state, has been held to be constitutional. It has been found desirable to divide cities into classes upon the basis of their population. The needs of a great city with a half-million or more of people are somewhat different, in many respects, from the needs of a city with ten thousand. The organization of their local governments and the management of their municipal affairs will be quite unlike. Each of these classes requires legislation peculiar to itself; but such legislation must be applicable to all the members of the class to which it relates, and must be directed to the existence and regulation of municipal powers, and to matters of local government. The supposed classification in the act of 1879 is of a very different character. The act provides for the incorporation and government of street-railway companies, but it does not affect all such companies. It selects such companies as may be located in cities of the second and third class, and makes special provision for them, while all other street-railway companies remain under the operation of the general law. This is just what the constitution declares shall not be done; and this court has had occasion to enforce the constitutional prohibition in several cases. In *Davis v. Clark*, 106 Pa. St. 377, a statute came up for examination which undertook to deal with mechanics' liens in counties whose population was less than two hundred thousand. This was held to be a local law. It was not an attempt at the classification of counties for any purpose of local government, but an effort to provide a lien in one part of the state under circumstances which would not entitle the mechanic to one under the general law."

Any legislation which is arbitrary, which deals with particular persons or things of a class, or which confers privileges or burdens on towns or cities, while other cities or towns in like situation are excepted from its operation, is special and void. Instances of this description may be found in *State v. Board of License*, 48 N. J. L. 438; *State v. Winsor*, 48 N. J. L. 95; *Earle v. Board of Education*, 55 Cal. 489; *Desmond v. Dunn*, 55 Cal. 242; *State v. Wood*, 49 N. J. L. 85; *Appeal of Scranton*, 113 Pa. St. 176. Neither the legislature nor the courts have power to limit the operation of any general law to any particular county, district, or locality: *Darling v. Rodgers*, 7 Kan. 592. Hence a statute which, by its terms, can apply to only one, or at most to only part, of the whole number of counties in the state, and although purporting to be a general law, is special and void: *State v. Boyd*, 19 Nev. 43; *Hallock v. Hollingshead*, 49 N. J. L. 64; *McGill v. State*, 34 Ohio St. 228; *Freeholders of Hudson Co. v. Buck*, 49 N. J. L. 228; and this, although it purports to have application to all counties having a certain designated population: *Devine v. Board of Commissioners*, 84 Ill. 590; *McCarthy v. Commonwealth*, 110 Pa. St. 243; *State v. County Court*, 89 Mo. 237. This result follows, because the mere fact of designating counties as a class, according to a minimum population, which makes it certain that but one county in the state can avail of the benefits of a law applicable to such class, is a mere device to evade the con-

stitutional provision prohibiting special legislation: *Devine v. Board of Commissioners*, 84 Ill. 590. So an act which excepts a certain county or counties from its operation is void as special legislation: *Robinson v. Perry*, 17 Kan. 248; *Kelley v. State*, 6 Ohio St. 269; *Morrison v. Bachert*, 112 Pa. St. 322; *Davis v. Clark*, 106 Pa. St. 377; *State v. Freeholders of Hudson Co.*, 50 N. J. L. 62; *State v. Township of Northampton*, 50 N. J. L. 496. An act, however, which is based on a minimum of population, and applies to all the counties in the state alike, is general and valid: *Hanlon v. Board of Commissioners*, 53 Ind. 123; *State v. Standley*, 76 Iowa, 215.

Laws in relation to taxation must be general and uniform throughout the state, and, under this provision, a law which relates to the payment of poll-tax throughout the state is general: *State v. Freeholders of Essex County*, 45 N. J. L. 504. The constitutional provision does not take away from the legislature the power of selecting the subjects of taxation. It only requires that all the members of a class selected shall be included in the taxing law, and that the rule applied thereto shall be uniform as to the whole of such class, and that the assessment shall be made at the true value of the property constituting the class. If these requirements are answered by the law, it is general and valid. Hence a law providing for the taxation of all canal and railroad property within the state may be valid: *State Board of Assessors v. Central R. R. Co.*, 48 N. J. L. 146. So an act in relation to the settlement and collection of unpaid taxes in all the cities of the state is general: *In re Commissioners*, 49 N. J. L. 488. But a law which provides a different method of levying taxes in places which are seaside resorts, from that provided for other places, is special and void: *State v. Philbrick*, 50 N. J. L. 581.

Legislation affecting alike all railroads within the state as a class is not special, but general and valid, and such legislation may define their duties and liabilities, or limit the rate to be charged for freight or for the transportation of passengers: *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *Little Rock etc. R'y Co. v. Hanniford*, 49 Ark. 291; *Dow v. Beidelman*, 49 Ark. 325; *Phillips v. Missouri etc. R'y Co.*, 86 Mo. 540; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155. Although laws relating to crimes must be general and of uniform operation, still, it is only required that they operate uniformly and alike in all parts of the state, under like facts. Hence an act for the prosecution of felonies by affidavit and information in certain cases is a general law: *Heanley v. State*, 74 Ind. 99; *Elder v. State*, 96 Ind. 162; and a statute providing a punishment for an act which is *malum in se* wherever committed is a law of a general nature, and cannot be pronounced special in its operation because the inhibited act is of greater evil in a large city than in other parts of the state: *Ex parte Fulk*, 42 Ohio St. 638.

Several special statutes grouped together in a general act do not constitute a general law: *Board of Freeholders v. Stevenson*, 46 N. J. L. 172.

STATE v. BROWN.

[47 OHIO STATE, 102.]

INCEST, SINGLE ACT CONSTITUTES. — A single act of sexual intercourse between persons related by blood or affinity within the degree prohibited by statute constitutes incest.

INCEST — SUFFICIENT AVERMENT. — Under a statute prohibiting the commission of the sexual act between persons "nearer of kin than cousins," an indictment alleging the commission of the sexual act by uncle and niece is sufficient, without a direct averment that that relationship is nearer than that between cousins, or that they were related by blood or affinity.

INCEST — SUFFICIENT AVERMENT. — An indictment charging incest between an unmarried uncle and his niece is equivalent to an averment that she was not his wife.

INCEST, WHEN NOT MODIFIED BY STATUTE, IS SEXUAL COMMERCE, either habitual or in a single instance, either under form of marriage or without it, between persons too nearly related in consanguinity or affinity to be entitled to intermarry.

INCEST — SUFFICIENT AVERMENT. — Under a statute prohibiting the commission of the sexual act between persons "nearer of kin than cousins," an indictment charging incest between uncle and niece need not allege that they were not husband and wife, whether they had gone through the ceremony of marriage or not. Nor is it material in such case that the marriage was celebrated in a country where it was valid.

CRIMINAL LAW — PRACTICE — DISCHARGE OF JURY WITHOUT VERDICT. — Where, in the trial of a criminal case, the evidence is excluded from the jury on the ground that the indictment charges no offense, the jury must be discharged without rendering a verdict.

INDICTMENT for incest.

Homer Harper, prosecuting attorney, for the state.

BRADBURY, J. The counts of the indictment held to be insufficient to charge an offense, read as follows: —

Second count. — The jurors of the grand jury of the state of Ohio, within and for the body of the county of Lake, impaneled, sworn, and charged to inquire of crimes and offenses committed within said county of Lake, in the name and by the authority of the state of Ohio, on their oaths, do further find and present that Benjamin Robert Brown, late of said county, on the eighth day of November, in the year of our Lord one thousand eight hundred and eighty-five, with force and arms, in said county of Lake, and state of Ohio, being then and there an unmarried man, did commit fornication with Rose Cramer, by then and there unlawfully and feloniously having sexual intercourse with the said Rose Cramer, the said Benjamin Robert Brown being then and there the uncle of the said Rose Cramer, and the said Rose Cramer

being then and there the niece of the said Benjamin Robert Brown, and the said Benjamin Robert Brown and the said Rose Cramer then and there having knowledge of their relationship, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

Fifth count. — The jurors of the grand jury of the state of Ohio, within and for the county of Lake, impaneled, sworn, and charged to inquire of crimes and offenses committed within said county of Lake, in the name and by the authority of the state of Ohio, on their oaths, do further find and present that Benjamin Robert Brown, late of said county of Lake, on the sixth day of January, in the year of our Lord one thousand eight hundred and eighty-six, with force and arms, in said county of Lake, and state of Ohio, being then and there a married man, did commit adultery with Rose Cramer, by then and there unlawfully and feloniously having sexual intercourse with said Rose Cramer, the said Rose Cramer being then and there the niece of the said Benjamin Robert Brown, the said Benjamin Robert Brown and the said Rose Cramer being then and there persons nearer of kin by consanguinity than cousins, the said Benjamin Robert Brown and the said Rose Cramer then and there having knowledge of their relationship, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

The offense intended to be charged by each of these two counts is a violation of section 7019 of the Revised Statutes. That section provides: "Sec. 7019. Persons nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, who commit adultery or fornication together, shall be imprisoned."

The court of common pleas held that neither count charged an offense under this section. The particular averment or averments the omission of which, in the opinion of that court, were fatal to these counts have not been pointed out to this court, no brief having been filed in support of the rulings of which complaint is made; but we are not left to conjecture, wholly, respecting them, for the propositions combated by the prosecuting attorney in his brief indicate at least his understanding of what they were, though he fails to state them in direct terms.

However, after a careful examination of this brief and the record in the case, we yet have some doubts respecting the par-

ticular defects or omissions which the court of common pleas held to be fatal, and therefore have carefully examined the two counts in question, with a view to ascertain what, if any, necessary averment or averments were omitted. From the argument submitted by the prosecuting attorney, it seems some doubt was entertained by the court of common pleas respecting the sufficiency of a single adulterous act to constitute the offense of incest, one act only being charged in each of the counts. That one such act is sufficient is established, we think, by the case of *Barnhouse v. State*, 31 Ohio St. 39. It is true the statute in force when that case arose prohibited "sexual intercourse" between parties within certain degrees of kinship (Swan & Critchfield's R. S. 405, sec. 8), while the statute in force when the offense charged against the defendant was committed prohibits "adultery or fornication" within the prohibited degrees: R. S., sec. 7019. But there is nothing in this change of phraseology to indicate a purpose to require a series of acts, of cohabiting together, to constitute incest. A single act of unlawful sexual intercourse falls within the definition of "adultery" or "fornication," according as the party is married or not: Bouv. Law Dict. 92, 606; 1 Am. & Eng. Ency. of Law, 209, and cases there cited. And that the words were used in this sense by the legislature in declaring what should constitute incest clearly appears, when section 7019 is compared with section 7020. The latter section prescribes in direct terms that the party shall "cohabit" with another in a state of adultery or fornication, to constitute an offense under it; but in the section now under consideration (sec. 7019) no such word is found. The two sections are in immediate juxtaposition, were passed at the same time, and are nearly allied. This makes the omission of the word "cohabit" from the section under consideration the more significant. It evinces a purpose to prohibit, in the one case, an act in its very nature repulsive and shocking to every sense of decency, while by the other section a demoralizing condition, a living together in an unlawful connection, is the thing to be prohibited; and appropriate language was adopted by the legislature, in each section, to attain the object in view.

The first count under consideration (No. 2 in the indictment) avers that the defendant and Rose Cramer, with whom he committed the sexual act, were uncle and niece, respectively, to each other, but does not aver, in direct terms, that

that relationship is nearer than that between cousins, nor does it show whether they were related by blood or affinity.

Is it necessary to aver in express terms that the kinship is nearer than that between first cousins? or will it suffice if the degree of it is averred, and it is one necessarily nearer than cousins? While the statute (sec. 7019), in general terms, prohibits the sexual act between persons "nearer of kin . . . than cousins," it may well be doubted whether a general averment, in the words of the statute, would be definite enough to satisfy the rules of criminal pleading. It would remain uncertain which of the several degrees of kinship nearer than that between cousins was intended to be charged. Where, however, the precise degree of kinship is averred, all indefiniteness disappears. Nor is it for the jury to determine, in each particular case, whether the kinship between the parties to the act, be they father and daughter, brother and sister, or uncle and niece, is or is not nearer than that between cousins. This is matter of law determinable by fixed principles applicable alike to every case. The kinship being averred to be that of uncle and niece, it was unnecessary to aver in addition, that which was matter of law, that they were nearer of kin than cousins. The authorities in support of this principle are innumerable; one only will be referred to. Bishop says, quoting from Buller, J.: "It is one of the first principles of pleading that you have only occasion to state facts, which must be done for the purpose of informing the court whose duty it is to declare the law arising upon those facts, and apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it": 1 Bishop's Crim. Proc., sec. 329.

That the kinship between an uncle and his niece is nearer than that between cousins, within the meaning of this statute, is clear, notwithstanding that by the rules of the common law both were considered as standing in the same degree. The rule of the common law which accomplishes that result relates to the descent of property only; for, notwithstanding this rule of the common law, sexual commerce between uncle and niece in England is incestuous, while that between cousins is not. The law respecting incest, from the nature of the mischief to be prevented, necessarily regards the actual kinship of the parties as the predicate for its prohibitory enactments: *Griffith v. Reed*, 1 Hagg. Ecc. 195; *Woods v. Woods*, 2 Curt. Ecc. 516; Story on Conflict of Laws, secs. 114, 208.

And the kinship between an uncle and niece is double that between cousins.

We hold, therefore, that, within the meaning of section 7019, the kinship between uncle and niece is nearer than that between cousins.

While the question whether kinship by affinity should be protected equally with that by consanguinity is one about which different opinions may be held (Story on Conflict of Laws, secs. 114, 115), yet it falls within the province of the legislature to determine it; and that body having, in the same section and by the same words, prohibited the sexual act, and prescribed the same penalty for its commission, whether the kinship be of the one class or the other, it is evident that no distinction was intended to be made between them, and that, under the statute (sec. 7019), if the parties are nearer of kin than cousins, it is immaterial whether it be by consanguinity or affinity: *Stewart v. State*, 39 Ohio St. 152. The supposed hardship of the law is much mitigated by the circumstance that kinship by affinity of the husband and wife, respectively, with the family of the other terminates with the dissolution of the marriage: *Noble v. State*, 22 Ohio St. 541.

The count now under consideration avers that the defendant is not married, so that if the indictment must show affirmatively that he and the woman with whom the sexual act was committed were not husband and wife, it sufficiently does so; not, it is true, by a direct averment, but by one from which the fact appears by necessary implication. The averment that he was unmarried is equivalent to one that she was not his wife.

The fifth count of the indictment differs from the second, in that it avers the defendant to be married, and the sexual act to be adultery; and in addition to averring that the defendant and Rose Cramer were uncle and niece to each other, directly averred that they were "nearer of kin by consanguinity than cousin."

The only question necessary to be determined in connection with this count that has not been decided in passing upon the sufficiency of the second count is the necessity of the count negating the marriage of the defendant and Rose Cramer.

By referring to the statute, section 7019, it will be observed that it contains no exception in favor of parties who are in-

termarried; the language is general, and comprehends them as well as the unmarried. Upon what principle, then, can an exception be ingrafted in this section by judicial construction? We know of none. By the law of England, the intermarriage of the parties did not render the connection any less incestuous: *Blackmore v. Brider*, 2 Phillim. 359; *Woods v. Woods*, 2 Curt. Ecc. 516. Bishop defines it as follows: "Incest, where statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between persons too nearly related in consanguinity or affinity to be entitled to intermarry": Bishop on Statutory Crimes, sec. 727. The act is little, if any, less repulsive to a correct sense of decency, and no less a violation of sound public policy, because it is perpetrated by persons living together publicly under the form of marriage, than if done by them clandestinely and occasionally only. We hold, therefore, that by section 7019, Revised Statutes, sexual commerce, as between persons nearer of kin than cousins, is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based on principles of sound public policy, because they have assumed, in another state or country, where it was lawful, the relation which led to the acts prohibited by our laws.

After the jury was impaneled and sworn, and the trial begun, the defendant's counsel objected to the introduction of any evidence by the state, on the ground that the counts of the indictment upon which the state had elected to proceed did not charge an offense. The court, adopting that view, refused to permit any evidence to go to the jury, and, upon motion of defendant's attorney, ordered the jury to return a verdict of not guilty, and thereupon discharged him from custody. To all which the prosecuting attorney excepted.

If the view taken by the court was correct and no offense was charged, there was nothing of which he could be acquitted, and the verdict would be of no benefit to him. He could not plead it in bar of a subsequent prosecution. It would only benefit him in case the court had erred, and the indictment did charge an offense. As the case stood upon the holding of the court, no offense was charged against the defendant, and

under those circumstances the state had a right to require the jury to be discharged. There was nothing for them to do; the defendant was not charged before them with any offense, nor had any evidence against him been submitted for their consideration. The party was liable to be re-indicted and again put upon trial; and if upon the subsequent trial the first indictment was held good upon a plea of former acquittal, the verdict would be an absolute bar. True, the defendant, upon the subsequent trial, if the jury had been discharged at the first one without rendering a verdict, might plead his former jeopardy; and if upon that plea the former indictment should be held good, it might avail him as effectually as a verdict of not guilty. Of this we express no opinion; for whether the discharge of a jury, so made necessary by a ruling of the court, had on the defendant's own motion, would, in case the first indictment upon a plea in bar should be held good, be a bar to a subsequent prosecution, it was the right of the state, under the circumstances, to prevent the rendition of a verdict of not guilty, which would be an undoubted bar, whatever effect might be given to the other.

Exceptions sustained.

IN THE CASE OF *Chinn v. State*, 47 Ohio St. 575, Alfred Chinn was indicted, tried, convicted, and sentenced to one year's imprisonment for having committed adultery and incest with one Ann Rafferty. The indictment was based upon the provisions of section 7019, Revised Statutes of Ohio, providing that "persons nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, who commit adultery and fornication together, shall be imprisoned in the penitentiary not more than ten years nor less than one year." At the trial the state proved that Mary Chinn and Thomas Rafferty are brother and sister by consanguinity; that Thomas Rafferty was and is the husband of Ann Rafferty; that defendant Alfred Chinn was and is the husband of Mary Chinn; that the said connection by marriage is the only relationship that exists between Alfred Chinn and Ann Rafferty, and that they had sexual intercourse, with knowledge of their relation, as charged in the indictment.

The court refused to charge that upon this state of facts the jury should return a verdict of not guilty, and charged, instead, that if the jury believed these facts, "then the said Ann Rafferty was the sister by affinity (commonly known as sister-in-law) of said defendant, Alfred Chinn, and that they were nearer akin by affinity than first cousins."

Exceptions were reserved to the ruling of the court, and to the charge as given.

The question presented, then, is, whether or not the defendant, Alfred Chinn, is related to Ann Rafferty by affinity as brother and sister in law, and if so, whether or not they are related to each other by affinity nearer than cousins. In passing upon this question, the court said: "The term 'affinity,' as used in determining the persons between whom marriage may be lawfully

solemnized, and those between whom sexual intercourse is to be regarded as incestuous, has received in law, by its application and use, a definite signification, and we must assume that the legislature, in enacting this section defining the crime of incest, used it in the same sense. It expresses the relationship which arises by marriage between one of the parties and the blood relations of the other, but it does not include those only related by affinity to the other. As sometimes stated, the *consanguinei* of the wife are the *affines* of the husband, and *vice versa*; but the *affines* of the wife are not those of the husband, nor are the *affines* of the husband those of the wife: 2 Stephen's Com. 285. It is thus defined by Erskine in his Institutes, b. 1, tit. 6, sec. 8: 'Affinity is that tie which arises in consequence of marriage betwixt one of the married pair and the blood relatives of the other; and the rule of computing its degrees is, that the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity; which rule holds also, *e converso*, in the case of the wife's relations. Thus where one is brother by blood to the wife, he is brother in law, or by affinity, to the husband. But there is no affinity between the husband's brother and the wife's sister, which is called by the doctors *affinitas affinitatis*; because then the connection is formed, not between one of the spouses and the kinsmen of the other, but between the kinsmen of both.' See also 1 Bouv. Law Dict., tit. Affinity, and the same in Brown's Law Dict.; 1 Am. & Eng. Ency. of Law, 315, and notes; 1 Bla. Com. 435, Christian's note. In the note just cited, it is said: 'Though a man is related to his wife's brother by affinity, he is not so to his wife's brother's wife, whom, if circumstances would admit, it would not be unlawful for him to marry'; and hence intercourse between them, however immoral, would not be incestuous. The section of the crimes act defining and punishing incest prior to the revision of 1877 simply designated the persons by the relationships in which they stood between whom sexual intercourse was punished as an offense (S. & C. 405); and it will be perceived that those arising from marriage, as step-father and step-daughter, step-mother and step-son, simply included cases of intercourse between one party to the marriage and a blood relative of the other, following as far as it went the established rule for the determination of relationship by affinity; and we see no reason for supposing that the legislature, in its revision of the crimes act, intended to depart from this general rule, and establish a kind of relationship by marriage unknown to the law. The fact that more remote degrees of such relationship are included argues nothing, as effect can be given to this extension, without departing from the principle upon which relationship by affinity is determined. It then appears that, upon the proof offered by the state, the defendant should have been acquitted, and the court erred in charging as it did. There is no relation by affinity nor consanguinity between the defendant and Ann Rafferty; she is simply an *affinis*, and not a *consanguineus*, of Mary Chinn, the defendant's wife; or in other words, she is simply the wife of the defendant's wife's brother, Thomas Rafferty. Since it appears from the evidence that the defendant is not guilty of the crime charged, the judgment must be reversed and the defendant discharged."

BARRICK v. GIFFORD.

[47 OHIO STATE, 180.]

CORPORATIONS — STATUTE OF LIMITATIONS — LIABILITY OF STOCKHOLDERS.

— When a corporation has become wholly insolvent, and has ceased to do business, and has assigned its property for the benefit of creditors, suit to enforce their statutory liability may be commenced against the stockholders by creditors, without any of them first recovering judgment and having an execution returned unsatisfied, and the statute of limitations begins to run from that time against the right of action.

CORPORATIONS — STATUTE OF LIMITATIONS — LIABILITY OF STOCKHOLDERS. —

Where a corporation has property and continues to do business, a creditor must first obtain judgment against it, and have an execution returned unsatisfied, before he can bring suit against the stockholders upon their individual statutory liability, and the statute of limitations begins to run against them from that time, and not before.

CORPORATION — METHOD OF ENFORCING STATUTORY LIABILITIES OF STOCK-

HOLDERS. — A suit in the nature of a creditor's bill is the proper method to be adopted by creditors of an insolvent corporation to enforce the statutory liability of its stockholders, and when such suit is brought, no creditor can acquire priority nor maintain a separate suit to enforce such liability in his own behalf.

CORPORATION — INSOLVENCY — CREDITOR'S BILL — STATUTE OF LIMITATIONS. —

A suit in the nature of a creditor's bill to enforce the statutory liability of the stockholders of an insolvent corporation saves the running of the statute of limitations, not only as against the claim of the one filing it, but also as against the claim of every creditor of the corporation who comes into the action before its final termination.

CORPORATIONS — LIABILITY OF STOCKHOLDERS. —

A change in the stockholders of a corporation has no effect upon its legal status. It remains, through all changes in the *personnel* of its stockholders, the same legal entity, possessed of the same rights, and subject to the same liabilities.

CORPORATIONS — LIABILITY OF NEW STOCKHOLDER. —

When one purchases or acquires stock in a corporation, no matter at what time, he acquires a fractional interest in the capital stock, assets, profits, and liabilities of the corporation.

CORPORATIONS — LIABILITY OF NEW STOCKHOLDER. —

If an existing stockholder of an insolvent corporation is solvent, it is immaterial, so far as his statutory liability to creditors is concerned, when he became the owner of the stock, or from whom he acquired it.

J. Buckingham, for the plaintiff in error.

J. R. Davies, for the defendant in error.

MINSHALL, C. J. A number of errors are assigned, which, so far as they arise upon the record, we will proceed to notice.

1. It is first claimed that the action of Gifford against the stockholders on their statutory liability was barred by the statute of limitations. There is no question as to the period of the limitation. The liability is one created by statute, and must therefore be commenced in six years from the time it

accrues: R. S., sec. 4981; *Hawkins v. Furnace Co.*, 40 Ohio St. 507.

It is then necessary to determine, — 1. When the right of action of Gifford against the stockholders accrued; and 2. Whether it was commenced in the requisite time thereafter.

The action of the coal and iron company was commenced October 10, 1878. It was an action by it as a creditor "on behalf of itself and all other creditors of the Sunday Creek Coal and Iron Company," against the company and its stockholders. Gifford was made a party, and the prayer was, that an account be taken of the amount due it "and the other creditors of said insolvent company."

Gifford's claim was based upon the right to the return of certain bonds, belonging to him, in the possession of the company. He demanded a return of the bonds June 15, 1874. The bonds not being returned, he afterwards commenced suit against the company in the common pleas of the county, and at the January term, 1881, recovered a judgment thereon for the sum of \$8,863.05 for the conversion of the bonds. Thereafter, on August 30, 1881, he, by leave of the court, filed his answer and cross-petition in this suit, setting up the recovery of his judgment, and his right as a creditor of the coal and iron company to resort to the statutory liability of its stockholders for the satisfaction of the same. He also, as a first cause of action, averred the existence of certain unpaid subscriptions to the capital stock of the company, and asked that they should be first applied to the payment of his claim. This was found against him by the court, and no recovery was allowed him thereon; so that all the questions on error arise upon the cause of action against the stockholders upon their statutory liability.

Issues of fact were made by the answer of the plaintiff in error, Barrick, and other stockholders, and the replies of Gifford thereto. These issues were all found in favor of Gifford. So that it appears from the record, — 1. That he was delayed in the recovery of his judgment against the company by the opposition of Barrick and other stockholders; 2. That on December 23, 1876, the company became insolvent, and made an assignment of all its property for the benefit of its creditors; and 3. That up to this time it was the legal and equitable owner of a large amount of unencumbered property, subject to levy and sale on execution, amounting in value at times

to more than a hundred thousand dollars, and at no time to less than twenty thousand dollars.

The liability of the stockholders under the statute is not a primary resource of the creditors: *Wright v. McCormack*, 17 Ohio St. 86. And it follows, as a corollary from this, that, as a general rule, it can only be resorted to after the assets of the company have been exhausted. "This rule," says Mr. Cook, who has made the subject a special study, "is based upon the principle that the liability of the share-holder is not a primary resource of corporate creditors, and is not, therefore, to be resorted to if the assets of the corporation, including the assessments on the stock enforceable at common law, will suffice to pay the debts": Cook on Stock and Stockholders, sec. 219. See also, to the same effect, Thompson on Liability of Stockholders, secs. 312, 313, 324.

But this rule does not require that in all cases a judgment must be recovered against the corporation, and an execution issued and returned no goods, before the creditor has the right to proceed against stockholders on their statutory liability. The law does not require the doing of a vain thing, and therefore, where the company has become wholly insolvent, has ceased to do business, and assigned all its property to a trustee for the benefit of its creditors, the suit to enforce their statutory liability may be commenced against the stockholders by the creditors, without any of them first recovering a judgment against the company, and having an execution issued and returned unsatisfied: *Morgan v. Lewis*, 46 Ohio St. 1; Thompson on Liability of Stockholders, sec. 321.

But it is claimed on the authority of *Hawkins v. Furnace Co.*, 40 Ohio St. 507, that insolvency, in the sense that the company is indebted in a sum greater than its assets, is sufficient, and that the right of action in favor of creditors against stockholders, upon their statutory liability, then accrues, although the company is possessed of property subject to levy and sale on execution, and continues to do business. We do not so understand this case. The question in the case arose upon a demurrer to the petition, which simply averred that "in the course of its business, the company became largely involved in debt, and became insolvent in the year 1860." And it is said, in the opinion by Martin, J., "Whether a judgment debtor only can, in analogy to a creditor's bill, maintain the action, is a question that has not been argued before us, and upon which we express no opinion. The theory of the

petition is, that when the company is insolvent and the debt is due, the action accrues. This theory is the more favorable one for the plaintiff in considering the demurrer, and we adopt it." Now, it is plain that what is here meant is, that the court adopts the theory of the plaintiff as the one most favorable to him on the demurrer to his petition, and not that it adopts it as the true rule in determining when the cause of action accrues. If, however, by the term "insolvent," as used in this case, is simply meant the want of assets by a corporation sufficient to pay all its debts, notwithstanding it has property subject to levy and sale on execution, and continues to do business, then it is not approved. Such a rule would be not only uncertain, but deceptive to the creditor. The right to commence the action would be a matter of speculation. It could not be determined, before bringing the action and taking an account, whether the company was indebted in a sum greater than its assets would pay or not. A rule of certainty, applicable to such cases, should be adopted. The true rule, and that which is usually adopted, where the company has property and continues to do business, is to require the creditor first to obtain a judgment against the corporation and cause an execution to be issued, and if it is returned not levied for want of goods, then the creditor has the right to commence suit against the stockholders upon their individual liability, and the statute of limitations begins to run against the right of action from that time, and not earlier.

So long as the company is possessed of corporate property, and continues to transact its business, the stockholders should be regarded as estopped from averring that the right of action against them, as individuals, accrued, by reason of the insolvency of the company, at a period earlier than the return of an execution unsatisfied, issued upon the judgment of a creditor of the company. Stockholders have the means of knowing the condition of their company much better than creditors, and if the company continues to do business upon an insolvent basis, it should be regarded as permitted by the stockholders, as the directors and officers of the company derive their authority from, and are the agents of, the stockholders.

We therefore conclude that in this case the right of the creditors of the coal and iron company, to sue its stockholders upon their statutory liability accrued when the company made an assignment of all its property and ceased to do busi-

ness, on December, 23, 1876, and not earlier: *Thompson on Liability of Stockholders*, sec. 293.

2. The next question is, Was it arrested by the commencement of judicial process within the limitation of the statute? A suit in the nature of a creditor's bill is the proper proceeding to be adopted by creditors of an insolvent corporation seeking to enforce the statutory liability of its stockholders: *Umsted v. Buskirk*, 17 Ohio St. 113. And when such suit is commenced, no creditor can acquire priority, or institute a separate suit for the enforcement of such liability in his own behalf: *Wright v. McCormack*, 17 Ohio St. 86. So that it necessarily follows that the effect of commencing the suit by one creditor is to save the running of the statute of limitations, not only as against the claim of the one filing it, but also as against the claim of every creditor of the corporation who comes into the action before its final determination. And this is the general rule. "A bill filed by one creditor, as plaintiff, in behalf of himself and others will prevent the statute from running against any of the creditors who came in under the decree. Every creditor has, after the filing of a bill, an inchoate interest in the suit, to the extent of its being considered as a demand, and to prevent his being shut out, because the plaintiff had not obtained a decree within the six years": Angell on Limitations, 6th ed., p. 346, sec. 331. See also *Sterndale v. Hankinson*, 1 Sim. 393; *Brinkerhoff v. Boswick*, 99 N. Y. 185; Angell on Limitations, sec. 167.

"In such a proceeding," says Morawetz, "the proceeds of the liability of all the share-holders are regarded as a fund to be distributed ratably among all the creditors. Every creditor is entitled to come in and share in the distribution, whether he has previously obtained a judgment or not. Those creditors whose claims against the corporation are disputed may establish their claims before a master in chancery, or referee, or in such other way as the court may direct": Morawetz on Private Corporations, sec. 884.

An examination of the amended petition of the iron company, filed April 1, 1881 (the original petition filed October 10, 1876, not being printed), shows that it was in fact a creditor's bill. It purported to be, and was, brought by the plaintiff "on behalf of itself and all other creditors of the coal and iron company"; and asked for an account on behalf of itself "and the other creditors of said insolvent company." Hence, as Gifford's cause of action against the stockholders first accrued

in 1876, it was not barred when the suit was begun. And this would be so, even if it were held that, as to him, it was not commenced until he filed his cross-petition, which was August 10, 1881.

3. It is also claimed as a defense that, after the assignment by the company and the acceptance of his trust by the assignee, an agreement was entered into by the assignee, Gifford, and the other creditors, that the unpaid subscriptions averred by Gifford in his first cause of action to be due should not be collected or required by the assignee to be paid; and that by reason of this agreement Gifford lost his right to enforce payment under the statutory liability, on the ground that he had thereby released a primary fund, and to which he might have resorted for the payment of his claim. We shall not consider the question of law intended to be raised by this defense, for the reason that there is no positive averment that there were any unpaid subscriptions to be collected. The judgment of the court was against Gifford on his first cause of action; in other words, it found against the existence of any such subscriptions, so that there was nothing to release by the alleged agreement, and the rights of the defendant were in no way affected thereby. In order to have raised the question, the defendant should have averred that there were such unpaid subscriptions, and that they were released by the agreement. But this has not been done.

4. It is also claimed that the court erred in sustaining a demurrer to the sixth defense of the defendant's answer. It reads as follows:—

“That two hundred of the four hundred shares which the defendant in said second cause of action is alleged to be the owner had not been issued or sold by the said the Sunday Creek Coal and Iron Company, nor was the legal or equitable owner or holder thereof, at the time said last-named company assumed and agreed with said the Sunday Creek Coal and Iron Mining and Transportation Company to pay and perform the said contract between said last-named company and said Gifford, but was first sold and issued by the said the Sunday Creek Coal and Iron Company several years after it so assumed to pay Gifford, but was so sold and issued before the said Gifford made his said demand for the return of the bonds of June 15, 1874.

“Wherefore, he says he is not liable to said Gifford in respect of said last-named two hundred shares.”

The Sunday Creek Coal and Iron Company grew out of the prior company named in the defense, and seems to have acquired the property and assumed the obligations of that company. The obligation to Gifford in regard to these bonds was one of them. The bonds had been received from him as an accommodation, no consideration being paid for the loan. The obligation assumed by the bailee was to cut off the coupons as they matured, sell them, and remit the proceeds to Gifford, and return the bonds on thirty days' notice. The obligation arose *ex locato*, and no liability beyond this accrued to Gifford as against the company until, upon demand, it refused to return the bonds, which was June 15, 1884; so that, as a matter of law and fact, the liability of the company for the conversion accrued to Gifford after Barrick became the owner of all his stock.

But in holding the facts pleaded insufficient to constitute a defense, we do not place our decision on this ground. Whilst there are some resemblances between the stockholders of a corporation and the members of a partnership, there are few that are real, and no inferences can be drawn therefrom as to the rights of creditors against stockholders upon their individual liability: Taylor on Private Corporations, sec. 716. A new member of a firm is not, in the absence of agreement, liable for the debts of the firm contracted before he became a member. The addition of a new member makes a new firm. A change, however, in the stockholders of a corporation has no legal effect upon its *status*. It remains, through all changes in the *personnel* of its stockholders, the same legal entity, possessed of the same rights, and subject to the same liabilities. When one purchases stock in a corporation, he acquires a fractional interest in the capital stock and assets of the company, proportionate to the amount of his stock. If there is a surplus, he acquires an equivalent interest in it, and is entitled to dividends when they are earned; but if there should happen to be a deficiency, the maxim applies, *Qui sentit commodum sentire debet et onus*, and is therefore required to contribute his share to the discharge of the common burden. The application of this principle is not varied by the time when the owner acquired his stock. The right, with the correlative duty, is an incident of the stock. There is no difference, in this regard, between the opinion of the majority and that of the minority in the case of *Brown v. Hitchcock*, 86 Ohio St. 667. In both, it is held that the individual liability of

stockholders to creditors is to be discharged, primarily, by those who are the owners of the stock at the time the right to assert it accrues. But in the opinion of the majority it was held that, in the case of the insolvency of an existing owner, a person from whom the insolvent existing owner obtained the stock by assignment, either mediately or immediately, may be made liable for such debts as may have been contracted while he remained owner; the minority holding that the obligation attached exclusively to those who are holders of the stock at the winding up of the company, or when the right is asserted by creditors.

If, then, an existing stockholder is solvent, it is immaterial, so far as his liability to creditors is concerned, when he became the owner of the stock, or from whom he acquired it. As such stockholder he is individually liable for the debts of the company to the extent limited by the statute. Such liability attaches to every share of stock issued by a company; the stock and the liability go together, so that whoever owns the stock must sustain the burden when the company becomes insolvent.

The plaintiff in error relies upon *Bonewits v. Van Wert Co. Bank*, 41 Ohio St. 78. No such question arose in that case. All that was there decided is, that a finding that two of the stockholders did not own stock at the time the indebtedness of the plaintiff accrued did not authorize a judgment in their favor releasing them from liability. This was right, and determined the question before the court. The additional remark, that "if the finding had been that the stock they held when the action was commenced had not been sold by the corporation until after the debt of the plaintiff had accrued, the judgment would have been proper," was simply a misleading statement, outside of the case, and no way necessary to its determination.

Judgment affirmed.

CORPORATIONS — ACTION BY CREDITOR WHEN CORPORATION IS INSOLVENT.
— An action at law by a single creditor will lie against any stockholder of an insolvent corporation to enforce an individual liability created by its charter: *Schalucky v. Field*, 124 Ill. 617; 7 Am. St. Rep. 399. As to the time within which such actions must be brought, see *Hyman v. Coleman*, 82 Cal. 650; 16 Am. St. Rep. 178, and note; *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 257, and note. For a thorough discussion of the statutory liability of stockholders to creditors, and its enforcement, see extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 834-872, wherein is considered the question of whether a stockholder's liability is primary, or subject to other

proceedings first taken against the corporation; compare note to *Prince v. Lynch*, 99 Am. Dec. 432-435. Ordinarily, the creditor must obtain a judgment against the corporation, and the execution issued thereon be returned *nulla bona*, before a bill in equity will lie against the stockholders: *Payne v. Bullard*, 23 Miss. 88; 55 Am. Dec. 74, and note; but this rule does not apply when the corporation is insolvent: Note to *Germantown etc. Ry Co. v. Filler*, 100 Am. Dec. 552-557.

STANLEY v. STANLEY.

[47 OHIO STATE, 225.]

STATUTE OF LIMITATIONS — ABSENCE FROM STATE. — If a defendant is absent from the state when a cause of action accrues against him, his occasional or frequent visits to the state, giving the plaintiff an opportunity, by the exercise of ordinary diligence, to commence an action against him, will be of no avail to him under a plea of the statute of limitations, however open and notorious his visits may have been, unless he has been within the state and the jurisdiction of her courts for the full period limited by the statute, either continually or in the aggregate.

STATUTE OF LIMITATIONS — ABSENCE FROM STATE. — The statute of limitations does not run in favor of a defendant while he is absent from the state, no matter if he was so absent when the cause of action accrued; and whenever he departs from the state after having come into it, the running of the statute is suspended from that time and during his absence, whether the cause of action first accrued while he was in, or while he was absent from, the state.

S. S. Knowles, for the plaintiff in error.

A. D. Follett, for the defendant in error.

MINSHALL, C. J. The question in this case arises upon the defense in the answer to which the demurrer was sustained. The defense was intended to avoid the effect of the averments in the petition as to the absence of the decedent from the state at the time the plaintiff's causes of action accrued, and his continued absence thereafter until the time of his death. The question requires a construction of the following section of the Revised Statutes, relating to the statute of limitations: —

"Sec. 4989. If, when a cause of action accrues against a person, he is out of the state, or has absconded, or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

It is necessary to observe that it is not claimed in the defense to which the demurrer was overruled that the causes of action to which it was pleaded, or any of them, arose in the state of West Virginia, the residence of the deceased, or were to be performed there. Such averments were made as separate grounds of defense, and were met by denials. The gist of the defense to which the demurrer was interposed is, that although the decedent resided in the state of West Virginia when the causes of action accrued, yet he frequently came into this state, and within the jurisdiction of the courts of the county in which the plaintiff resided, after the causes of action accrued, and more than six years before the action was commenced; and that these occasions were attended with such circumstances of notoriety that the plaintiff could, with the exercise of ordinary diligence, have obtained service upon him. The defense admits that the deceased was a non-resident of the state at the time the causes of action accrued; but it is claimed that if, at any time thereafter, he came into the state so that the plaintiff might have commenced his action, the statute began to run, and continued to do so, though he may have departed the state the next day, and have remained out of it the residue of his life.

We do not so construe this statute. Where a defendant is out of the state when a cause of action accrues against him, our construction is, that the statute does not begin to run until he comes into the state. It then begins to run against him, and if he remain in the state, it will be barred in the period limited from that time. But if, after he comes into the state, he again depart from it, the running of the statute is suspended during his absence. It is not necessary that we should determine in this case whether absence upon business—the defendant continuing a resident of the state—is sufficient, or whether it must be limited to absence as a non-resident of the state, for it is admitted that the decedent was a resident of the state of West Virginia, and his absence, therefore, referable to that fact.

The design of the statute is to give to the plaintiff the full period of the limitation, in available time, for the commencement of his action; so that, in ascertaining this period, the time the defendant is out of the state is not computed as any part of the time given him in which to commence his action. This is in close analogy to the Roman law, which, in like cases, counted only the available days, *tempus utile*, on which activity

was possible, in ascertaining whether an action was barred by limitation or not; and days on which the action was hindered by the absence of the defendant were excluded from the computation of the term: *Poste's Gaius*, 255.

This is the only rational construction that can be placed on the statute, and makes it consistent with itself. Thus in the second clause, it is provided, in so many words, that if after the cause of action accrues, the defendant depart from the state, "the time of his absence . . . shall not be computed as any part of the period within which the action must be brought." It could not, then, have been intended by the legislature that where a defendant was absent from the state at the time a cause of action accrued, his return to the state would not only set the statute to running in his favor, but that it would continue to run, whether he remained in the state or not.

The first clause provides for the case where the defendant is absent from the state when the cause of action accrues; the second for the case where he departs from the state after it has accrued. In the first, the statute begins to run when he comes into the state; in the second, it ceases to run, and is suspended until he returns to the state. The purpose, then, of the statute is perfectly plain: Presence of the defendant within the state, so that he may be sued, avails in his favor; absence from the state, whether at the accruing of the action or afterwards, suspends the running of the statute.

This is the first time the precise question seems to have arisen in this court, so that none of its previous decisions afford any light in determining it. But most of the other states have statutes of limitations with provisions similar in this regard to our own, which have been frequently construed by their courts; and the general result of these decisions is, that when a defendant is absent from the state when a cause of action accrues against him, his occasional or frequent visits to the state will be of no avail to him under a plea of the statute of limitations, however open and notorious his visits may have been, unless he has been in the state, and the jurisdiction of its courts, for the full period limited by the statute, either continuously or in the aggregate.

The statute of the state of Maine is substantially the same as our own; and there, in a suit on a promissory note, which the defendant claimed was barred, he offered to show that though he lived in the province of New Brunswick, he was frequently in the state, to the knowledge of the plaintiff.

But the court said: "The defendant was absent from and resided out of the state when the cause of action accrued, and has not since resided within it, though he may have occasionally been within its limits," and it was held that he could not avail himself of the bar of the statute: *Hacker v. Everett*, 57 Me. 548. We cite, in this connection, and to the same effect, *Milton v. Babson*, 6 Allen, 822; *Lane v. National Bank*, 6 Kan. 74; *Smith v. Heirs of Bond*, 8 Ala. 386; *Chenot v. Lefevre*, 3 Glim. 637; *Bell v. Lamprey*, 57 N. H. 168; *Bassett v. Bassett*, 55 Barb. 505; and *Bennett v. Cook*, 43 N. Y. 537; 3 Am. Rep. 727. In the last case the defendant resided in Jersey City, but did business in New York City, and was there some eight or ten hours each day. He pleaded the statute. But the court said: "If the statute runs at all during the presence of a non-resident within the state, such presence must, in any view of the case, amount in the aggregate to six years to render the defense available." And in *Bassett v. Bassett*, 55 Barb. 505, it is said: "The object of the exception in the statute was to give the creditor the whole of the six years' residence in the state within which to commence his action. He is not obliged to follow the debtor to another state; nor is he called upon to watch him to ascertain whether he comes into the state for a temporary purpose, so long as his residence is elsewhere."

Our conclusion, then, is, that, under the provisions of section 4989, Revised Statutes, the statute of limitations does not run in favor of a defendant to a cause of action whilst he is absent from the state; and this principle is not affected by the fact that the defendant may have been absent from the state when the cause of action first accrued against him; for whenever he departs from the state, after having come into it, the running of the statute is suspended from that time and during his absence, whether the cause of action first accrued whilst he was in, or whilst he was absent from, the state.

Judgment reversed, and cause remanded, with direction to sustain the demurrer to the second defense in the additional answer, filed June 18, 1884, and for further proceedings.

STATUTE OF LIMITATIONS — ABSENCE FROM THE STATE, EFFECT OF. — Absence from the state stops the running of the statute of limitations as to causes of actions against the absent party; but his absence does not stop the running of the statute as to causes of action in his favor: *Stone v. Hammell*, 83 Cal. 547; 17 Am. St. Rep. 272; see *McCann v. Randall*, 147 Mass. 81; 9 Am. St. Rep. 666, and note. Where a debtor is a non-resident at the time

when the cause of action against him accrues, the statute of limitations does not begin to run until he returns to the state with the intention of making his residence therein: *Armfield v. Moore*, 97 N. C. 34. Compare note to *Moore v. Armstrong*, 36 Am. Dec. 72-78; note to *Langdon v. Doud*, 83 Am. Dec. 644, 645. The Virginia statute suspending the operation of the statute of limitations during the absence from the state of one who was a resident therein has no application to a person who left the state, but was never a resident thereof: *Dorr v. Rohr*, 82 Va. 359; 3 Am. St. Rep. 103. Actions accruing in favor of sureties who pay suretyship debts accruing before they leave the state are barred after the statutory period of limitation, although such sureties may leave the state before the expiration of such period: *Rhoton v. Mendenhall*, 17 Or. 199. In Tennessee, a temporary absence from the state of a resident debtor after a cause of action against him has accrued suspends the running of the statute: *Kempe v. Bader*, 86 Tenn. 189. In a suit upon a judgment rendered in another state, where the judgment debtor left before it was barred, the time elapsing from the date of his removal from such state to the date of commencing the suit cannot be counted in ascertaining whether the action was barred: *Nicholas v. Farwell*, 24 Neb. 180.

JAYNES v. PLATT.

[47 OHIO STATE, 262.]

ATTACHMENT—UNDERTAKING—LIABILITY OF SURETIES.—The undertaking given by defendant in attachment takes the place of the attachment proceeding and of the property seized under the writ, and the sureties in the undertaking are bound to the amount thereof, the same as the property of the defendant or the garnishee would have been bound if no undertaking had been given.

ATTACHMENT—JUDGMENT CONCLUSIVE AGAINST SURETIES IN UNDERTAKING BOND.—In an action upon an undertaking bond in attachment to recover the amount of a judgment against defendant in attachment, the sureties in the undertaking are bound by such judgment, and, in the absence of fraud, collusion, or clear mistake, cannot question its correctness, or the action of the court at any step in the proceeding up to and including the rendition of final judgment.

JUDGMENT IN ATTACHMENT, PRESUMPTIONS IN FAVOR OF, AS AGAINST SURETIES IN UNDERTAKING BOND.—Where, in an action upon an undertaking in attachment to recover of the sureties therein the amount of a judgment against the defendant in attachment, it appears that prior to the rendition of such judgment an amended petition was filed and answered, it will be presumed that the court, in passing upon the application for leave to file the amended petition, ascertained and found that the claim declared upon therein, though stated in different form, was based upon the same facts and transactions as the claim stated in the original petition, and an answer in the action on the undertaking, stating the facts, and alleging non-liability on the ground that the action in which the judgment was rendered was a different action from that in which the undertaking was given, does not present a defense.

ACTION by Andrew Platt against Harris Jaynes and Andrew Jaynes to recover \$5,763.28, and interest from May 3, 1880.

The petition averred that on July 25, 1868, plaintiff commenced an action against B. A. De Wolf, and caused an attachment to be issued, whereupon De Wolf caused an undertaking to be issued, with H. and A. Jaynes as his sureties in the sum of eleven thousand dollars, which was duly approved. The undertaking bound the defendant to perform the judgment of the court in that action, and thereupon the attachment was discharged. In May, 1880, Platt recovered a judgment against De Wolf for \$5,689.85 and \$73.93 costs, which judgment is still in force and wholly unsatisfied. Harris Jaynes filed a separate answer, averring that the action in which the attachment issued and the undertaking was executed was at law for money had and received by De Wolf to and for the use of the plaintiff, amounting to five thousand five hundred dollars, with interest from July 24, 1868, for which sum plaintiff prayed judgment; and that this was the only ground of action set forth in the petition; that no judgment was ever rendered upon said cause of action, but that, some time after the execution of the undertaking, Platt filed an amended petition, wholly abandoning the former cause of action, and in lieu thereof stating one in equity to obtain an accounting between copartners and the determination of partnership liabilities growing out of a business conducted by Platt, DeWolf, and one Porter, and afterwards by Platt and De Wolf; that, under issues joined on the amended petition, Platt recovered judgment against De Wolf for \$5,689.35, which was the only judgment rendered in the case; that defendants, H. and A. Jaynes, before executing the undertaking, carefully inquired into the indebtedness stated in the original petition, and, ascertaining that it did not exist, executed the undertaking; that the amended petition in equity was filed without the knowledge or consent of defendant Jaynes, and that it stated a cause of action wholly foreign to that stated in the original petition. A copy of the original and of the amended petitions were made part of the answer. The amended petition set out the articles of copartnership existing between Platt, De Wolf and Porter, and the business transactions between them and Platt and De Wolf after the retirement of Porter. Under such petition, plaintiff therein claimed as due him from De Wolf five thousand five hundred dollars, with interest from July 29, 1868, and also prayed for an accounting and any balance found due, and for further relief. The answer of H. Jaynes was demurred to on the ground that it did not state facts suf-

ficient to constitute a ground of defense. The court of common pleas overruled the demurrer, and a reply being filed, judgment was rendered for defendant upon the hearing. The circuit court reversed this ruling for error in overruling the demurrer and rendering the judgment, and from the judgment of the circuit court an appeal is taken by writ of error.

Boynnton, Hale, and Horr, for the plaintiff in error.

Samuel E. Williamson, for the defendant in error.

SPEAR, J. The question is, Did the amended answer state a defense to the plaintiff's action?

Plaintiff in error seeks a reversal of the judgment of the circuit court sustaining the demurrer, on the ground that the judgment rendered against De Wolf and in favor of Platt was not rendered in the action in which the undertaking sued upon was given. In other words, that the amended petition was so different from the original as to make a new action, and that therefore the liability of the surety was changed without his consent, whereby, upon well-settled principles, he was discharged.

To sustain this contention the plaintiff in error must be prepared to show,—1. That he can be permitted to inquire into the judgment rendered in favor of Platt and against De Wolf; and 2. That upon such inquiry it will appear that the action in which the judgment was rendered was not the action in which the undertaking was given. Failure to establish either of these propositions is fatal to the claim.

Was the judgment of the court of common pleas in favor of Platt conclusive in an action on the undertaking to release the attachment?

We think an examination of section 5545, the statute under which the undertaking is permitted, will suggest an answer to the question. That section provides, not only for the giving of the undertaking and specifies its character, but defines the effect of it when given. The condition must be "to the effect that the defendant shall perform the judgment of the court." On the giving of the undertaking "the attachment shall be discharged and restitution made of any property taken under it, or the proceeds thereof." The undertaking "shall also discharge the liability of a garnishee in the action for any property of the defendant in his hands."

By so giving an undertaking, the defendant in attachment is enabled to supersede the proceedings under the writ of at-

tachment, and substitute for the security afforded the plaintiff by a seizure of property, either directly or in the hands of a garnishee, the personal stipulation and liability of the sureties in the undertaking that "the defendant shall perform the judgment of the court." Of course this implies the judgment in the action. In the undertaking here, the words "in this action" were added, but they neither enlarged nor limited the import of the statute.

The undertaking is purely in the interest of defendant. It is given to enable him to regain and retain full use of his property attached, or to be attached, and the undertaking takes the place, for all the purposes of the case, of that property, as well as of the attachment itself. Having thus placed himself in the attitude of a substitute for the attachment and for the property, it would seem to follow that the surety is affected by whatever would have affected the property, and liable to respond upon his undertaking, under the same circumstances, and within the limit of his undertaking, to the same extent that the property could have been subjected or the liability of the garnishee enforced. If the subsequent action of the court is such as to have the effect of releasing the property attached and discharging the attachment, or of discharging the garnishee from liability had no undertaking been given, then the surety could, with reason, claim release; but if whatever may be done by way of amendment of pleadings, or otherwise, would not have that effect, then it is difficult to see what reasonable claim to release can be urged. The undertaking is to be construed in connection with the existing law pursuant to which it is made, and with regard to the object sought to be accomplished by the statute authorizing it. This object, as we have seen, is to enable the defendant to substitute for the attachment a security which should be available to the plaintiff upon the recovery of a judgment. Surely the legislature did not intend that the security afforded the plaintiff by his attachment might be impaired by enabling the defendant to substitute security of less value or of less efficacy.

In the case under consideration the attachment entitled the plaintiff to charge in the hands of the garnishee named in the affidavit the moneys and credits belonging to De Wolf, and subject them to the payment of his debt. If no undertaking had been given, the plaintiff could and would have availed himself of that mode of satisfaction. By giving the under-

taking, the sureties enabled the defendant to obtain a valuable benefit in the possession and control of the moneys and credits sought to be reached by the process of garnishment. And, in legal effect, they made the liability of the garnishees their liability, and thus consented to stand in the place of the garnishees, and to become themselves liable, not exceeding the amount named in the undertaking, to the same extent, and under the same circumstances, as the garnishees would have been had no undertaking been given. It cannot, with reason, be claimed that the filing of the amended petition could have the effect of discharging the attachment or releasing the garnishees.

The case made in the new pleading, though different in its form of statement from that in the original, was not necessarily a case based upon different facts. Whether it was or not was a matter proper to be inquired into when the application to file the amended petition was being considered, and it will be presumed that the court, in passing upon the application, ascertained and found that the claim declared upon in such amended petition, though stated in different form, was based upon the same facts and transactions as the claim stated in the original petition. Nor did the form of either exclude the right to an attachment. Each was an action for money. Lord Mansfield denominated the action for money had and received "a kind of equitable action." The early authorities held that "where money is due *ex æquo bono*, it may be recovered in an action for money had and received." None doubted that it is for the recovery of money. And since the decision in *Goble v. Howard*, 12 Ohio St. 165, no doubt has existed that in this state one partner, in an action against his copartner, after dissolution of the firm, to recover what is claimed to be due, may have an order of attachment as in other civil actions for money. The only person who could have interposed a legal objection to the ruling of the court in allowing the amended pleading to be filed was the defendant in the case, and he only by a proceeding in error to reverse. No such proceeding was instituted, and the final judgment stands as conclusive against him. It is, we think, in the absence of allegations of fraud, collusion, or manifest mistake, equally conclusive against the sureties in the undertaking. They are liable for the amount of the judgment, irrespective of its legal merits, because such is the nature of their contract. They cannot, any more than could a surety for a plaintiff in at-

tachment, or in replevin, go behind the judgment and allege that, for errors committed, it is contrary to law. Any other construction of the statute would defeat its obvious purpose. Nor can it be said that such result could not have been in contemplation of the parties, for, whatever they may allege otherwise, in signing the undertaking these sureties must be presumed to have done so with knowledge of the statute, and of the power of the court to allow amendments to the pleadings. If they acted on a mistaken idea of the meaning of the statute, or of practice in the courts, and were thereby misled to their injury, it is their misfortune.

But if we should apply to this undertaking the strictest rules of construction, it is difficult to see how the contention of plaintiff in error could be maintained. The language is, "Perform the judgment of the court in this action." Admittedly, these words mean the action then pending. An action includes the formal proceedings attendant upon the demand of a right made by one party of another, which is properly said to terminate at judgment. The view of counsel seems to confuse "cause of action" with "action," and to seek to substitute for the proceeding itself the right upon which it is based. Beyond all question, the judgment was rendered in the action in which the undertaking was given, unless the filing of the amended petition itself made a new action. No other action was commenced, and none other prosecuted. And a fair interpretation, as well in accordance with the language as with the sense of the obligation, would hold the term "this action" to mean the suit then pending between the parties.

We have not overlooked the many cases in this state and elsewhere cited by the learned counsel for plaintiff in error in his brief. But we cannot agree that they require a reversal of the judgment. The question turns upon a construction of our statute, and that is not controlled by the decisions of courts of other states. Many of the Ohio cases cited are actions on official bonds. In *State v. Colerick*, 3 Ohio, 487, where, in a suit upon a sheriff's bond against the sureties, the record of a judgment against the principal alone had been admitted, this court say: "Where the sureties have notice of the suit, and may or do make defense, the judgment against the principal is conclusive against them. Where such notice is not given, the judgment against the principal is *prima facie* only. It may be impeached for collusion, or for mistake.

But until so impeached, it is sufficient to entitle the plaintiff to recover the amount for which it is rendered." A somewhat careful examination of Ohio cases fails to discover one where the court has held to the contrary of this. It is true that in the opinion in *State v. Jennings*, 14 Ohio St. 73, the judge states his opinion, based upon authority, to be, that where sureties have no notice of the action against the principal they may "not merely attack the judgment for fraud or collusion, but open up the inquiry into the merits," though he intimates that the decisions which establish the rule "may be subject to just criticism, and questionable as to the principle on which they rest." The action was one against a constable and his sureties on his bond, and at the trial the record of the judgment previously rendered against the constable alone was rejected. The facts hardly called for a holding to the extent indicated in the opinion, and in the *syllabus* the case of *State v. Colerick*, 3 Ohio, 487, is cited and followed. But whatever the law may now be in such cases, a distinction, we think, is to be taken between them and the case we are considering. In general, the obligation in official bonds is, that the surety will be responsible in case the officer fails to faithfully discharge the duties of the office. The question in issue in an action on the bond against the sureties is, Has there been dereliction of official duty within the meaning of the bond? and has the party complaining been damnified? In this class of cases the question is different. It is, Did the plaintiff recover judgment, and for what amount? and did the defendant satisfy it? Proof that a judgment was rendered for the plaintiff in attachment, which the defendant has not satisfied, shows a breach of the bond. And of such judgment it would seem that the record itself is not only the best, but the only, evidence, and, until impeached for fraud, collusion, or manifest mistake, ought to be held conclusive.

The precise question here presented has not been before this court heretofore. But some of the cases referred to by counsel for defendant in error in his brief we think bear upon the case before us. *Bentley v. Dorcas*, 11 Ohio St. 398, was an action against sureties upon a bond given for appeal from the judgment of the court of common pleas to the district court. The answer alleged, among other defenses pleaded, that the decree in the district court on appeal was rendered upon a different and distinct liability from that sustained by the common pleas, and upon a ground not made in the pleadings;

and such a decree, it was urged in this court, could not have been in contemplation of the parties, and should not be regarded as within the terms of their contract. But the court, speaking by the opinion, held that they were not at liberty, in that proceeding, to say that the district court erred, but were bound to assume that the decree of that court was properly made; that if the decree was prejudicial to any of the parties, their remedy was by a direct proceeding to reverse or modify, and as no such step had been taken, the court must regard the decree as valid and correct, and must decide only on its legal effect on the liability of the parties who had executed the bond.

In *Braiden v. Mercer*, 44 Ohio St. 339, the question presented was, whether or not, in an action upon a guardian's bond for recovery of amount found due the wards upon a final settlement of the guardian's account in the probate court, the sureties were concluded by the judgment. The court held that they were, and that, in the absence of fraud and collusion, they could not be heard to question its correctness, or to demand a rehearing of the accounts. In the opinion, the learned chief justice uses language which seems to have application here: "By their bond the sureties contract with reference to the action of a court, and that their principal will obey its order and conform to such action. Can they say they are strangers to such proceeding? Upon their principal's failure to obey the order of the court there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called to answer for the breach of the bond, to call in question the grounds upon which the court based its action, and to have the same case retried. . . . Indeed, it may well be considered an established principle that whenever a surety has contracted with reference to the conduct of the parties in some suit or proceeding in court, he is, in the absence of fraud and collusion, concluded by the judgment"; and in support cites a long list of cases.

The supreme court of Wisconsin, in *Sutro v. Bigelow*, 31 Wis. 527, in a well-considered opinion, construes the statute of that state, which is similar in substance to section 5545, giving to it the same construction hereinbefore placed upon that section. See also *Hanna v. International Pet. Co.*, 23 Ohio St. 622; *Methodist Churches v. Barker*, 18 N. Y. 463; *United States v. Mosely*, 7 Saw. 265; *Inbusch v. Farwell*, 1

Black, 566; also *Lothrop v. Southworth*, 5 Mich. 448; *Towle v. Towle*, 46 N. H. 434; *Heard v. Lodge*, 20 Pick. 58; 32 Am. Dec. 197; *Shepard v. Pebbles*, 38 Wis. 373.

In this case, the allowance by the trial court of an amendment to the petition, if wrong, was but an error, and was valid until reversed. No claim of fraud, collusion, or mistake in the proceedings is made by plaintiff in error, and we think he was bound by the judgment rendered against De Wolf, and cannot be heard here to call it in question. We agree with the circuit court that the answer did not state a defense; and finding no error in the judgment of that court, the same is affirmed.

ATTACHMENT. — UPON GIVING THE STATUTORY BOND TO RELEASE PROPERTY FROM ATTACHMENT, the attachment is dissolved, and the action proceeds to judgment *in personam*: *Bunneman v. Wagner*, 16 Or. 433; 8 Am. St. R-p. 306. Receptor for attached property, when may show that it was not the defendant's, or not subject to attachment: See note to *Bursley v. Hamilton*, 25 Am. Dec. 426-430; see also *Benesch v. Waggoner*, 12 Col. 534; 13 Am. St. Rep. 254, and note. The sureties upon a bond dissolving an attachment are not discharged from their obligation by an amendment of the complaint which does not set up a new cause of action: *Doran v. Cohen*, 147 Mass. 342.

JUDGMENT, CONCLUSIVENESS OF. — Judgments are conclusive upon parties and their privies: *Winston v. Westfeldt*, 22 Ala. 760; 58 Am. Dec. 378; note to *Gould v. Sternburg*, 15 Am. St. Rep. 142. As to who are privies, see *Lipcomb v. Postell*, 38 Miss. 476; 77 Am. Dec. 651, and note; *Marr v. Hanna*, 7 J. J. Marsh. 643; 23 Am. Dec. 449. For instances of parties who have been held to be concluded by judgments, see *Aultman v. Gamble*, 88 Ala. 424; *Grider's Estate*, 81 Cal. 571; *Leslie v. Bonte*, 130 Ill. 498; *Lieb v. Lichtenstein*, 121 Ind. 483; *Palmer v. Hayes*, 112 Ind. 289; *Stevenson v. Edwards*, 98 Mo. 622. As to the conclusiveness of a judgment against collateral attack, see *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301; note to *Gould v. Sternburg*, 15 Am. St. Rep. 143. Where a fact has been once litigated, the judgment rendered therein estops the parties and their privies from again raising the same fact: *Hall v. Zeller*, 17 Or. 381; *Keeler v. Milton*, 22 Neb. 310; although the two suits may have different objects in view: *Shumate v. Farquier County*, 84 Va. 574.

EMERY v. OHIO CANDLE COMPANY.

[47 OHIO STATE, 320.]

"TRUST" AND "COMBINATION" AGAINST TRADE, AGREEMENT IN AID OF, UNENFORCEABLE. — An agreement under which an association is formed, for the purpose of increasing the price and decreasing the manufacture of candles within a certain territory, is void as being contrary to public policy, and is not enforceable in the courts.

AN unincorporated company was formed in 1880, to continue for six years, and called the Candle Manufacturers' Association. Its object and effect were to increase the price and decrease the manufacture of candles within the territory covered by the agreement under which it was formed. The receipts of the company were placed in bank to the credit of the executive committee of the association, and could only be paid out on a check signed by at least two of them. The Ohio Candle Company joined the association in 1883, and withdrew therefrom in 1884. It had paid into the association \$22.40, and there was due it, as profits under the agreement, \$2,151.17. The committee offered to repay the sum paid in, but refused to pay the sum due as profits, claiming a violation of the agreement by such withdrawal. The Ohio Candle Company brought suit against the committee to recover the sum due as profits, and recovered judgment. The case was appealed by writ of error.

Perry and Jenny, for the plaintiffs in error.

Ramsey, Maxwell, and Ramsey, for the defendants in error.

The COURT. We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary to public policy, and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represent the association, and a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defense on which they might have relied, had the objects of the association been perfectly legitimate. But should a court be called on to consider any defense, so long as the claim itself is based upon an agreement to which

it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, nor under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the ill-gotten gains. The case of *Norton v. Blinn*, 39 Ohio St. 145, can have no application here, for this is a suit between parties to enforce the terms of the illegal agreement. See *Texas & Pac. R'y Co. v. Southern Pac. R'y Co.*, 41 La. Ann. 970, 17 Am. St. Rep. 445, where *Brooks v. Martin*, 2 Wall. 70, is accurately distinguished, and shown to have no application to a case such as this.

Judgment reversed, and petition of plaintiff below dismissed.

CONTRACTS TO STIFLE TRADE AND IMPEDE FAIR AND REASONABLE COMPETITION are invalid as being against public policy: *Texas etc. R'y Co. v. Southern Pac. R'y Co.*, 41 La. Ann. 970; 17 Am. St. Rep. 445, and note; *People v. Chicago G. T. Co.*, 130 Ill. 266; 17 Am. St. Rep. 319; *Gulf etc. R'y Co. v. State*, 72 Tex. 404; 13 Am. St. Rep. 815; *Santa Clara etc. Co. v. Hayes*, 76 Cal. 387; *Moses v. Scott*, 84 Ala. 608; *People v. North River Sugar E. Co.*, 121 N. Y. 532; 18 Am. St. Rep. 843, and note.

BEHRENS v. BEHRENS.

[47 OHIO STATE, 323.]

WILLS — CONTENT OF LOST, DESTROYED, OR SPOLIATED WILL — BURDEN OF PROOF. — Where the contents of a lost, destroyed, or spoliated will have been found, admitted to probate, and recorded by the probate court, the record is *prima facie* evidence in a future proceeding to contest the validity of the will, not only of its due execution and attestation, but also of its contents, and the burden of proof is then upon the contestant of the will to establish its invalidity, by evidence that it had been revoked by the testator by tearing, canceling, obliterating, or destroying it with intention to revoke it.

WILLS — LOST WILL — PRESUMPTION OF REVOCATION — DECLARATIONS OF TESTATOR AS EVIDENCE. — Where a will is proved to have once existed, and the testator retained custody of it, or had ready access to it, and it cannot be found after his death, a legal presumption is raised that it was destroyed by him, with the intention to revoke it, and his declarations are admissible to destroy such presumption or to support and strengthen it.

WILL contest. Plaintiff recovered judgment in the court of common pleas admitting the will to probate. This judgment was reversed by the circuit court on appeal, and an appeal

from the judgment of the circuit court was taken to this court by writ of error.

Benjamin B. Kingsbury and Henry Newbegin, for the plaintiffs in error.

J. R. Tyler, Peaslee and Enos, and Stephenson and Knapp, for the defendants in error.

DICKMAN, J. It is conceded that Daniel Behrens, on the thirty-first day of October, 1882, made and executed in due form of law his last will and testament. On the twenty-eighth day of November, 1884, he died, leaving real and personal property, and as his heirs at law, Frederick Behrens and Henry Behrens, the plaintiffs herein, and George Behrens, the defendant, his only sons. After his decease, it was discovered that his will had been lost or destroyed, and the question arose whether the will was lost or destroyed prior or subsequent to the death of the testator, and if before his death, whether or not it was destroyed by the testator himself, with the intention of revoking the same. On the application of George Behrens, the probate court found that the will was not revoked by the testator, but that it had been lost or destroyed subsequent to his death, and thereupon established its contents to be as in the alleged copy produced in court, and admitted the same to probate.

In the action to contest the validity of the will, the order of probate was *prima facie* evidence of its due attestation, execution, and validity. By section 5948 of the Revised Statutes, last wills and testaments which have been lost, spoliated, or destroyed, when established as to their contents, and admitted to probate, are, in all respects, to be governed by the laws in force relating to other wills, not only as relates to the contents of the same, but in all other matters. In a proceeding to contest the validity of such a spoliated will admitted to probate, the burden of proof is on the contestants to invalidate it: *Haynes v. Haynes*, 33 Ohio St. 598; 31 Am. Rep. 579; *Mears v. Mears*, 15 Ohio St. 90. In *Banning v. Banning*, 12 Ohio St. 437, it is held that where the contents of a spoliated will have been found, admitted to probate, and recorded, in a proceeding duly had for that purpose in the probate court, such record is *prima facie* evidence, in a future proceeding to contest the validity of such will, not only of the due attestation and execution of such will, but also of its contents; and on the trial of the issue whether the will admitted to probate is the last will of the testator or

not, the same must stand, unless the jury are satisfied, by a preponderance of proof, that it is not, in substance, the will of the testator.

In assuming the burden of establishing by a preponderance of evidence that the will admitted to probate was not the last will of Daniel Behrens, it became material for the contestants to prove that his last will was not in existence at the time of his death, but had been revoked by the testator tearing, canceling, obliterating, or destroying the same, with the intention of revoking it. Section 5944 of the Revised Statutes authorizes the probate court to admit to probate an unrevoked last will, when the original has been lost, spoliated, or destroyed subsequent to the death of the testator, or after the testator has become incapable of making a will by reason of insanity. The court, in the matter of *Sinclair's Will*, 5 Ohio St. 291, in construing the same statutory provision then in force, held that the legislation of the state as it then existed did not permit a will lost or destroyed to be established, unless it was in existence subsequently to the death of the testator. "The general assembly," said Swan, J., "deemed it either impolitic, as opening the door to imposition and perjury, or unnecessary to permit wills lost or destroyed before the decease of the testator, to be established."

The court, therefore, as an essential fact to be determined, charged the jury as requested by the plaintiffs: "Before you can find that it was the last will and testament of the said Daniel Behrens, you must find that it existed and had not been revoked at the death of the testator, or at such time prior to his death when he ceased continuously after that to be of disposing mind and memory; and unless you find from the evidence that the said will was actually in existence at the time when the said Daniel Behrens ceased to be of disposing mind and memory, at or prior to his death, then the conclusion of law follows that the testator destroyed the will, with intent thereby to revoke it."

If the will did not exist at the time of the testator's death, and had been destroyed prior to that time, it could not be established under the statute as a will of which the original had been lost, spoliated, or destroyed subsequent to the death of the testator.

And here it may be inquired what, if any, conclusion of law or presumption arises from the fact of the non-existence, at the time of the testator's death, of his last will and testament

proved to have been made and executed. As requested by the plaintiffs, the court gave the following charge to the jury: "The presumption is, that if a will be not found after the death of an alleged testator, it was destroyed with intention of revoking it. This presumption may be strengthened by the declarations made by the testator before his death, to the effect that he intended to destroy the will; and if you believe from the evidence that the will alleged to have been made on the 31st of October, 1882, by Daniel Behrens, was not in existence after his death, you are at liberty to believe from this fact alone that the said will was destroyed by said Behrens with the intention of revoking it; and you may consider, as strengthening this presumption, any declarations made to persons before his death, by the said Daniel Behrens, that he would destroy the will, or had destroyed the will, or intended his children should share equally in his property."

In giving the foregoing instructions to the jury, and in admitting in evidence the declarations of the testator as to destroying his will, and dividing his property equally among his three sons, we find no error for which the judgment of the court of common pleas should have been reversed.

In general, it may be assumed that a will is kept in the custody of the testator himself, or under his control, to be changed, modified, or revoked according to his good pleasure. If at his decease it cannot be found, it is more reasonable to presume that he himself has destroyed his will, than that some other person has committed the crime and incurred the penalty of secreting or destroying it. In *Betts v. Jackson*, 6 Wend. 181, it is said by Chancellor Walworth: "Legal presumptions are founded upon the experience and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances, and the result being thus ascertained, whenever such circumstances occur, they are *prima facie* evidence of the fact presumed; and I have no doubt that five wills, made with all due formality, have been destroyed by the testators either in secret or when no one was present to be a witness to prove the fact, to where there has been one destroyed or suppressed by fraud, or lost by time or accident, before the death of the testator." Indeed, it is now well settled, and is a principle of universal acceptance in both the English and American courts, that where a will is proved to have once existed, and the testator retained custody of it, or had ready access to it, and it cannot be found after his

death, a legal presumption is raised that the will was destroyed by him with the intention of revoking it. In the recent case of *Collyer v. Collyer*, 110 N. Y. 486, 6 Am. St. Rep. 405, the rule is stated that when a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator, and this presumption stands in the place of positive proof: See also 1 Redfield on Wills, 329; 1 Williams on Executors, 157, and cases cited; 2 Am. Lead. Cas., 5th ed., 510; *Foster's Appeal*, 87 Pa. St. 67; 30 Am. Rep. 340; *Minkler v. Minkler*, 14 Vt. 125; *Betts v. Jackson*, 6 Wend. 181; *Minor v. Guthrie*, 4 S. W. Rep. 179 (Ct. of App. Ky., May 3, 1887); *Hatch v. Sigman*, 1 Demarest, 519; 1 Jarman on Wills, 5th Am. ed., 290, and cases cited; *Wargent v. Hollings*, 4 Hagg. Ecc. 245; *Lillie v. Lillie*, 3 Hagg. Ecc. 184.

Such a presumption of revocation may be overcome by circumstantial or other proof to the contrary. It may be rebutted by showing that the testator had no opportunity to revoke, and that his will was destroyed after his death. And for this purpose, declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, have been held to have been properly admitted: *Whitely v. King*, 17 Com. B., N. S., 756; *Keen v. Keen*, L. R. 3 Pro. & D. 105; *In re Johnson's Will*, 40 Conn. 587.

But while the declarations of the testator may be used to weaken the presumption that he has destroyed his will with the intention of revoking it, his declarations may also be received as evidence to strengthen and fortify the presumption that he has destroyed his will with such intention. Whether it be the making of a will or the destroying of one, the competency of the testator's declarations as evidence is alike in each case, and for the same reasons admissible: *Collagan v. Burns*, 57 Me. 465. In *Keen v. Keen*, L. R. 3 Pro. & D. 105, in order to rebut the presumption of revocation arising from a will which was in a testator's possession not being found after his death, evidence was produced of declarations by the testator showing an intention to adhere to the will. The court held that evidence of declarations of an intention not to adhere to the will, produced by the opponents of the will, was admissible to contradict the evidence of adherence, whatever might be the form of words in which such intention was ex-

pressed; and therefore that a declaration by the testator that he had burned his will was admissible, not as evidence of the fact of destruction, but as evidence of intention. Sir J. Hannen, in his opinion in the case, says: "I think there can be no doubt that while on the one hand evidence of statements made by a testator subsequent to the execution of a will, that he intends to act in conformity with the disposition contained in the will, is clearly admissible, it necessarily follows that other statements made by the testator, to a contrary effect, must also be admissible. The admissibility of such evidence cannot depend on the form of words in which the intention is expressed. Therefore a statement by a testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of destruction of the will, is evidence of intention from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion."

In *Lawyer v. Smith*, 8 Mich. 412, 77 Am. Dec. 460, after the death of the testatrix a will twenty-five years old was discovered, which was either torn or worn in several pieces. Whether the injury to the instrument was done by the testatrix or by some other person, and if by her, whether accidentally or intentionally, and for the purpose of revoking the will, were held to be questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, were held to be competent evidence.

In *Patterson v. Hickey*, 32 Ga. 156, it was decided that where the question is *revocavit vel non*, parol evidence as to the acts and declarations of the testator is admissible, although made at any time between the making of the will and the death of the testator.

A will is said to be ambulatory until the testator dies. Until his death the instrument has no force or effect, and until then he has the power to cancel or revoke it. If from being clothed with this power the presumption arises after his death that he destroyed his will, that presumption will be aided by his declarations as expressive of his feelings and intention. In *Weeks v. McBeth*, 14 Ala. 474, it was held that the declarations of the testator were admissible to strengthen the presumption of revocation, and to show that the will was destroyed

by the testator *animo revocandi*. And it was there stated as the invariable rule in the courts of England to admit the declarations of the testator, either to strengthen or to repel the presumption of revocation arising from the non-production of the will after the death of the testator, or to explain the act of destroying or canceling it.

The case of *Smiley v. Gambill*, 2 Head, 164, was a contest upon the will of Margaret Stewart. The testatrix burned a paper which she believed was her will, and died in that belief. This was proved by her uniform declarations, and by her acts in disposing by deeds of some of the same property named in the will, and in applications made to write another will for her, on the ground that she had destroyed the first. Caruthers, J., in delivering the opinion of the court, said that if the jury believed, as a matter of fact, that Mrs. Stewart burned a paper which she thought was her will, although it was not, with the intention of revoking by its destruction, and honestly believed that she had done it, and continued in that belief, without any subsequent recognition or even knowledge of its existence, the paper propounded would not be her will. As testimony bearing on this question, her declarations alone might not be sufficient, but they were competent, and it would be for the jury to determine whether they, together with other facts proved, made out the fact of burning, or intention to do so, by the act done.

The strongly expressed conclusion of the court in *Reel v. Reel*, 1 Hawks, 248, 9 Am. Dec. 632, is in accord with citations already made. "To reject the declarations of the only person having a vested interest, and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and they are received, not upon the ground of their being a part of the *res gestæ*, for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their competency. Those circumstances only go to their weight or credit with the tribunal which is to try the fact." See also *Collagan v. Burns*, 57 Me. 465; *Tynan v. Paschal*, 27 Tex. 286; 84 Am. Dec. 619; *Yount v. Yount*, 3 Grant Cas. 140.

It is not necessary to refer to the numerous other authorities which we have examined, and which bear directly upon this branch of the case. No claim is made that a will may

be revoked by the mere declarations of the testator, or otherwise than in the modes prescribed by the statute. But where a legal presumption is raised, upon the decease of the testator, that he destroyed his last will and testament in the statutory mode, with the intention of revoking it, it is obvious that while the declarations of the testator may be admitted as evidence towards rebutting the presumption of such destruction and revocation before his death, they may, with equally good reason, be received as evidence to support and strengthen that presumption.

It is urged in behalf of the defendant in error that the charge to the jury was erroneous and misleading. At the trial, the defendant excepted generally to the whole charge given by the court to the jury, without pointing out specifically the part or proposition of the charge excepted to, or the grounds of his exception. Of such an exception a reviewing court is not bound to take notice: *Adams v. State*, 25 Ohio St. 584; *Adams v. State*, 29 Ohio St. 412; *Berry v. State*, 81 Ohio St. 219; 27 Am. Rep. 506; *Everett v. Sumner*, 32 Ohio St. 562; *Powers v. Hazelton etc. R'y Co.*, 33 Ohio St. 429; *Western Ins. Co. v. Tobin*, 32 Ohio St. 77. But in the case at bar, upon an examination of the charge to the jury, we discover no error calling for a reversal of the judgment of the court of common pleas. The judgment of the circuit court should be reversed, and that of the court of common pleas affirmed.

WILLS, LOST OR DESTROYED — PROOF. — The mere absence of a will, which is proved to have been executed by the testator, raises a presumption that it was revoked by him; and this presumption can only be rebutted by the strongest proof to the contrary. The declarations of the testator are admissible as evidence for this purpose: Note to *Tynan v. Paschal*, 84 Am. Dec. 628-631; compare also *Kitchens v. Kitchens*, 29 Ga. 168; 99 Am. Dec. 453; *Burge v. Hamilton*, 72 Ga. 568; *Matter of Page*, 118 Ill. 576; 50 Am. Rep. 205, and note.

LEMBECK v. NYE.

[47 OHIO STATE, 323.]

WATERS — OWNERSHIP IN NON-NAVIGABLE LAKES — DEDICATION. — A non-navigable inland lake is subject to private ownership; and the owner thereof cannot be deemed to have dedicated it to the uses of boating, hunting, and fishing, simply because he interposed no objection to such use by his neighbors, adjoining proprietors, or strangers. Other circumstances must clearly and satisfactorily appear manifesting an intent on his part to so dedicate it.

WATERS — DEDICATION OF NON-NAVIGABLE LAKE. — The use of a non-navigable inland lake by the public for the purposes of boating, hunting, and fishing, without the knowledge of the owner, will not establish a dedication of any kind against him, no matter how long continued such use may be.

WATERS — CONVEYANCE OF NON-NAVIGABLE LAKE. — Where the owner of land surrounding a non-navigable inland lake, longer than it is broad, conveys a portion of the land bordering on the lake by a deed which describes the lake as one of the boundaries, the title of the purchaser extends to the center of the lake.

WATERS — DEED OF LAND ALONG NON-NAVIGABLE LAKE. — Where the owner of land surrounding a non-navigable lake conveys a portion thereof by deed describing the margin of the lake as one of the boundaries, the title of the purchaser extends to low-water mark only.

WATERS — DEED OF LAND ALONG NON-NAVIGABLE LAKE. — Where the owner of land surrounded by a non-navigable inland lake conveys a portion of the land by deed describing it by metes and bounds, without reference to the lake, the title of the purchaser only extends to the lines mentioned in the deed.

WATERS — RIPARIAN RIGHTS IN NON-NAVIGABLE LAKE. — The public has no right without prescription, as against the owner, to fish in and boat upon the waters of a non-navigable inland lake; nor have adjoining owners, without title in the lake, and without prescription, the right to engage in the business of letting for hire boats and fishing-tackle to such portions of the public as may resort to such lake to boat and fish for their pleasure and recreation.

WATERS — RIPARIAN RIGHTS IN NON-NAVIGABLE LAKE. — A riparian owner, by virtue of his ownership to the edge of the water of a non-navigable lake, has access to and the right to use the water thereof for domestic and agricultural purposes.

EQUITABLE RELIEF AGAINST TRESPASS. — Equity may be at once resorted to for appropriate relief when numerous acts of trespass are being committed and their continuance threatened under claim of right, and when the injury arising from each act is trifling, and the damages recoverable therefor inadequate as compared with the expense necessary to prosecute separate actions at law therefor.

Henderson and Kline, and Harrison, Olds, and Henderson,
for the plaintiff in error.

Boynton, Hale, and Horr, for the defendants in error.

BRADBURY, J. The contention between the parties to this action is over their respective rights to and in Chippewa Lake, a non-navigable body of water in Medina County, in this state; having an area of about four hundred acres, oval in form, though its extension from north to south is about twice as great as that from east to west. It is true that the plaintiff in error claims that the waters of the lake have subsided by reason of the deepening of the channel of its natural outlet, whereby a narrow strip of land entirely around the lake has been recovered, but as this claim is not sufficiently supported by the agreed statement of facts to require any consideration of the principles or authorities upon which he founds his claim to title thereto, it will not be further noticed in the decision of the cause.

The lake is situated in the Western Reserve lands, and upon the division of the lands of the Connecticut Land Company was, together with a body of land entirely surrounding it, allotted to Samuel Fowler and three others, and which, by sundry conveyances and certain proceedings in partition, became the property, in fee-simple, of Samuel Fowler and James Fowler as early as the year 1815, to whom all the parties to this proceeding trace title. By the conveyances and proceedings above noticed, the title to the lake, as well as the title to the lands inclosing it, vested in the Fowlers, if it is susceptible of private ownership, which we think it clearly is: *Bristow v. Cornican*, 3 App. Cas. 641, 652. "A lake which is not really useful for navigation, although of considerable size compared with ordinary fresh-water streams, may be private property": Gould on Waters, sec. 83; *Ledyard v. Ten Eyck*, 36 Barb. 102; *Hogg v. Beerman*, 41 Ohio St. 81; 52 Am. Rep. 71. Many other authorities could be cited in support of this proposition, but it is too well settled to require it to be done, even if controverted, which it is not in this action, although material to its determination.

It is agreed that, from an early period in the history of the state, hunters and fishermen, without license, resorted at will to the lake to hunt and fish, and that for more than forty years the public has had free access to it for boating, hunting, and fishing. It is not readily perceived how this early and continued custom can be said to cast any material light upon the intention of the parties in respect of the deeds by which the lands around the lake were from time to time conveyed; it can only be material, therefore, as tending to show a dedi-

cation of the lake by its owners to the public, and a consequent extinguishment of their private property therein. These facts may constitute a link in the chain of evidence necessary to prove a dedication of the lake to the public, but fall far short of establishing that fact. In truth, when consideration is given to the early customs of the people of this state in this respect, — their well-known habit of hunting and fishing upon all lands and waters where fish or game might be found, irrespective of their ownership, or whether inclosed with fences or not, — it is apparent that this class of evidence ought to be received and weighed with extreme caution as proof of a dedication to such uses. Private owners are not to be deemed to have devoted their property to uses of this kind simply because they interposed no objections to their neighbors, or even to strangers, hunting and fishing upon it; other circumstances must appear, manifesting that it was his intention to do so. Dedication depends upon the intention of the owner to devote his lands to a public use, and should be made to appear clearly and satisfactorily: 5 Am. & Eng. Ency. of Law, 400, 401; *Smith v. State*, 23 N. J. L. 712; Washburn on Easements, 209.

Here the owner did no act indicating an intention to devote the lake to the use of the public; it does not even appear that the owner had any knowledge that the public was using it in the manner that the agreed statement shows it to have been in fact used; and as dedication by parol, or *in pais*, acts by way of estoppel on the proprietor, used by the public unknown to him can have no appreciable probative force to establish a dedication against him.

The lake, as we have seen, being susceptible of private ownership, and having been allotted to the Fowlers, or to them and others whose title they obtained, upon the division of the Western Reserve lands, and not having been dedicated to the use of the public, passed by the deed made by the Fowlers August 11, 1876, to Ainsworth and McClure, under whom the plaintiff derives title, unless it had already passed to some or all of the purchasers of the lands surrounding the lake by virtue of the prior deeds of the Fowlers made to such purchasers. This depends upon the descriptions in those deeds and the rules of law that apply to conveyances of lands bounded upon non-navigable inland lakes. By a series of deeds, the first of which bears date of October 16, 1823, and the last, of January 24, 1868, the Fowlers conveyed all the

lands that surrounded the lake to various parties, under which the same are now held, and such parts of the lake as may have passed by virtue of these conveyances could not, of course, have been conveyed by a subsequent deed of the Fowlers, under which the plaintiff in error derives title; and it is therefore of the first importance to ascertain what those conveyances in fact include which necessitates a construction of their respective descriptions.

These descriptions may be divided into three classes. In the first class are two deeds, one from James Fowler et al. to Delanson De Forrest, the other from James Fowler and wife to Fred B. Chamberlain, wherein the lake itself is made one boundary of the land thereby conveyed; in the second class are four deeds, one from James Fowler to Catharine and Sally Trump, one from James Fowler to Charles Wheeler, one from James Fowler to William Walter, and the other from James Fowler to Charles Wright, wherein the margin of Chippewa Lake is made either a corner or one of the boundary lines of the lands conveyed by them respectively; while in the third class are two deeds, one from James Fowler et al. to Abraham Fritz, the other from James Fowler et al. to Conrad Snyder, in which the lands conveyed are described by metes and bounds only, no reference whatever being made to the lake.

The rule that lands, one boundary of which is a navigable river running through this state, extend to the middle of the stream, subject to easement of navigation, was laid down by this court as early as the year 1828: *Gavit v. Chambers*, 3 Ohio, 496. The same rule was applied to calls in a survey bounding lands upon a non-navigable stream shortly thereafter: *Benners's Lessee v. Platter*, 6 Ohio, 505; since which time the doctrine therein announced has been firmly maintained by this court: *Curtis v. State*, 5 Ohio, 324; *Lamb v. Ricketts*, 11 Ohio, 311; *Walker v. Board of Public Works*, 16 Ohio, 540; *June v. Purcell*, 36 Ohio St. 396; *Day v. Pittsburg R. R. Co.*, 44 Ohio St. 406.

The rule, however, is otherwise in respect to calls in a deed bounding the lands conveyed by it on the waters of Lake Erie: *Sloan v. Biemiller*, 34 Ohio St. 492. And in the case of lands bounded on the Ohio River, the clear tendency of judicial opinion in this state is to limit the title of the riparian proprietor to low-water mark: *Benners's Lessee v. Platter*, 6 Ohio, 508; *Lessee of Blanchard v. Porter*, 11 Ohio, 138, 142; *Booth v. Hubbard*, 8 Ohio St. 247; but the effect to be given

to a call in a deed that makes a non-navigable lake one boundary of the lands conveyed by it has not heretofore received the attention of this court. The authorities upon the question are in conflict, and seem to be incapable of reconciliation. In some of the states, and in England, the rule is to limit the operation of the conveyance to the water edge: Gould on Waters, sec. 80, p. 155; *Bloomfield v. Johnston*, L. R. 8 Com. Ir. 68; *Bradley v. Rice*, 13 Me. 198; 29 Am. Dec. 501; *Wood v. Kelley*, 30 Me. 47; *Wheeler v. Spinola*, 54 N. Y. 377.

In other states, notably Indiana and Michigan, the contrary rule may be considered as established: *Ridgway v. Ludlow*, 58 Ind. 248; *Stoner v. Rice*, 121 Ind. 51; *Clute v. Fisher*, 65 Mich. 48.

In this conflict of authority we are at liberty to adopt such rule on the subject as best comports with the presumed intention of the parties, a sound public policy, and the analogies of the rules in force in this state respecting boundaries upon running streams. It may be conceded that the numerical weight of authority supports the rule that a call in a deed making a non-navigable lake a boundary only passes title to the land to low-water mark; but be that as it may, no solid ground is readily perceived for limiting, in that case, the deed to the water's edge, and in the case of a running stream, extending its operation to the center or thread thereof; and in this state, where the rule is so firmly established that a boundary on a running stream carries the land to the middle or thread thereof, principles of analogy afford strong grounds for applying it to non-navigable lakes. The main reasons for the rule in one case apply equally to the other. The existence of "strips or gores" of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are stripes and gores of land along highways or running streams; the litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable, and alike vexatious in each of the cases, and that public policy which would seek to prevent this by a construction that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands conveyed, applies indifferently, and with equal force, to all of them. It would seem, also, that whatever inference might arise from the presumed intention of the parties against the reservation

of the land underlying the water would be as strong in one case as in either of the others.

That practical difficulties in the application of the rule may arise where the lake is so nearly round that it cannot be said to have any length as distinguishable from its breadth, or when the side lines of the respective parcels of land bounding on the lake approach it in such direction that if they should be extended to the center thereof they would cross each other, is apparent.

The latter difficulty is not at all unusual in the case of lands bounding on running streams, but does not prevent the application of the rule: 3 Washburn on Real Property, 459, note; Angell on Watercourses, sec. 55, where the subject is learnedly discussed by those able authors, and this difficulty overcome. Whether there are in Ohio non-navigable lakes of such shape that no length can be affirmed of them does not appear; if there are any such, and the rule applicable to running streams and to non-navigable lakes distinctly longer than they are wide cannot be applied to them, other appropriate rules must be adopted which, in the light of all the circumstances, may be regarded as effectuating the intention of the parties, and are consistent with public policy; one main object in all cases of this kind being to adopt and apply such rules as will accomplish those important ends.

Whatever difficulties may be conjectured as liable to arise in possible cases to the application of the rule we have adopted, in fact none do arise in the case before us, for Chippewa Lake is distinctly longer than it is wide, and a prolongation to its center of the side lines of the respective parcels lying along its sides will not cause them to cross each other. The rule, of course, excludes those lands which merely touch the end of the lake and do not at all extend along its sides.

This rule, however, is applicable to but two of the conveyances, — that to Delanson De Forrest and that to Fred B. Chamberlain. While if the parties to a deed make a running stream, a non-navigable lake, or a highway one boundary of the lands conveyed by it, public policy and the presumed intention of the parties will extend the line to the middle of such monument, yet it is competent for them to limit the conveyance to the side of the highway, the top of the bank of the running stream, or to the edge of the water of the lake: *Lessee of Blanchard v. Porter*, 11 Ohio, 138; *Lough v. Machlin*, 40 Ohio St. 332; and the question is, whether the parties to the

other deeds conveying the land surrounding Chippewa Lake have not done so. As has been shown in four of the conveyances of the Fowlers, of the lands bordering on the lake, the "margin" of the lake is made a boundary or corner instead of the lake itself. "Margin of the lake" is a term of unequivocal import, meaning the line where the earth and water meet around the lake; by the use of these words the parties have declared their intention to make, not the middle, but another part, of the lake — the edge of the water — the boundary line. No other construction can be given to the words the parties themselves have chosen, without doing violence to their meaning; and an intention contrary to the one expressed by the very words selected by the parties themselves cannot be presumed: *Lessee of McCulloch v. Aten*, 2 Ohio, 308; *Lamb v. Rickets*, 11 Ohio, 311; *Hopkins v. Kent*, 9 Ohio, 13; Gould on Waters, sec. 199.

In the remaining deeds from the Fowlers to the lands around the lake, the lands were described by metes and bounds, no mention of the lake being made. In descriptions of this class, only the lands within the bounds pass. "When lands are granted by metes and bounds, all the area within those bounds, and no more, passes": *Lockwood v. Wildman*, 13 Ohio, 430. Indeed, where the parties have by their deed inclosed the land by agreed lines, without any reference whatever to adjacent natural objects, it is difficult to conceive of a principle that would extend those lines to include those natural objects, however convenient they might be to the enjoyment of the land actually conveyed.

From the construction we have given to the descriptions contained in deeds made by the Fowlers conveying away the several parcels of land that surround the lake, it follows that the deeds made to Delanson De Forrest and Fred B. Chamberlain make the center of the lake one boundary of the tracts conveyed to them respectively, and that the other deeds carry title no farther than the edge of the water, and that therefore the title to all the bed of the lake, except what was covered by the De Forrest and Fred B. Chamberlain deeds, remained in the Fowlers, and by their deed of August 11, 1876, was conveyed to D. H. Ainsworth and A. W. McClure, and is now owned by the plaintiff in error by virtue of mesne conveyances from Ainsworth and McClure, as set forth in the agreed statement of facts.

It also follows that as the defendant Andrews claims title

under conveyances which constitute the margin of the lake a boundary, he has no title to any portion of the bed of the lake, nor has the defendant John Nye a title to any portion thereof, for the reason that although the deed from the Fowlers to Delanson De Forrest, and the mesne conveyances from the latter to J. H. Barrett, conveyed title to the center of the lake, yet the deed from J. H. Barrett to Levi Nye, the lessor of defendant John Nye, limits its operation to the edge of the lake by expressly making the margin thereof its boundary on the side or end of the tract abutting thereon. We therefore hold that the plaintiff in error is the owner in fee-simple of all that part of the bed of Chippewa Lake not covered by the deeds made by the Fowlers to Delanson De Forrest and Fred B. Chamberlain, and that those two deeds cover such parts thereof as are inclosed by a prolongation to its center of those lines of the description that approach the sides of the lake.

The bed of the lake being private property, the public has no right to fish in and boat upon its waters; nor have the defendants the right to engage in the business of letting for hire boats and fishing-tackle to such portions of the public as may resort to the lake to boat and fish for their pleasure and recreation. That the latter right is one that can be acquired by prescription may be admitted, but the facts agreed upon fall short of establishing it by that method, even if that contention was maintained on behalf of the defendants in error, which we do not understand is the fact, in view of the arguments presented in the able brief of their counsel.

The agreed statement of facts in respect to this question is as follows: "The defendants and their grantors have for more than forty years occupied continuously their respective lands to the water in all its variations, and have enjoyed the free use of the water in connection with their lands for the purpose of watering cattle, washing sheep, boating, and fishing, and without license or consent from any one."

This does not show that the enjoyment was adverse or under any claim of right. Both of these elements must exist, according to the current of authority, in connection with the prescribed period of enjoyment, to create a right by prescription: Washburn on Easements, 150; *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732.

However, conceding that these are not necessary elements of prescription, and that the defendants had acquired a pre-

scriptive right to water cattle, wash sheep, boat, and fish in the lake, yet it by no means follows that because they may do these things, that they may also erect docks extending into the water and embark in the business of keeping boats and fishing-tackle to let for hire to pleasure-seekers who may resort to the lake to boat and fish for recreation upon its waters. The two rights are clearly distinguishable from each other; and the contention is over the latter right only, in respect to which the agreed statement of facts, while it states that the defendants are exercising it is silent as to the duration of their enjoyment thereof, and therefore does not establish the right by prescription.

That a riparian proprietor by virtue of his ownership to the edge of the water of a private stream or lake has access to and the right to use the water for domestic and agricultural purposes is not controverted by the plaintiff in error. Such use may fairly be considered as within the presumed intention of the parties.

That the lake is valuable for the purpose of gathering ice from its frozen surface appears from the agreed statement of facts, and the right of the defendant to gather it was asserted on one side and denied by the other in the course of the argument; but the question is not made by the parties in their pleadings, and therefore cannot be noticed in the decree.

The agreed statement of facts shows that the defendant Nye is insolvent, and that the financial condition of Andrews doubtful; but aside from this, and were they both solvent and fully able to respond to any damages that might be recovered against them in actions of trespass, yet it is apparent from the whole record that such actions would not afford an adequate remedy for the violations of the rights of the plaintiff in error in the past; and those threatened in the future were, and are, during certain seasons of the year, of daily, if not of hourly, occurrence, under the claim of a right to do so; besides, the injury resulting from each separate act would be trifling, and the damages recoverable, therefore, scarcely equal to a tithe of the expense necessary to prosecute separate actions therefor.

It follows from the holding of the court respecting the effect to be given the several descriptions in the conveyances made by the Fowlers and others to the various parcels of land that surround the lake that neither of the defendants has shown a right to erect docks and let to hire for use thereon

boats and fishing-tackle; it also follows that in so far as these acts affect those portions of the lake to which the title of plaintiff does not extend, he is not entitled to relief against them, but is entitled to have so much thereof as his title covers protected from those unwarranted violations. There should be a decree, therefore, finding that, as against the defendants herein, the plaintiff in error is the owner in fee-simple and entitled to the exclusive possession of all the lands underlying the waters of Chippewa Lake except those parts thereof that, according to the rules hereinbefore laid down, were conveyed by the Fowlers to Delanson De Forrest and Fred B. Chamberlain, and restraining the defendants from letting to hire either boats or fishing-tackle, to be used on the water overlying the lands so found to belong to him.

Judgment accordingly.

SPEAR, J. I concur in the foregoing, except as to one point. I am of opinion that the title of neither defendant in error should be held to extend to the middle of the lake.

The decision in *Gavit v. Chambers*, 3 Ohio, 496, is the foundation of the doctrine in Ohio that the ownership of lands bounded by an inland stream carries the title of the owner to the middle. It was held in that case to be "vitally essential to the public peace and to individual security that there should be distinct and acknowledged legal owners for both the land and water of the country. . . . It cannot be reasonably doubted that if all the beds of our rivers supposed to be navigable, and treated as such by the United States in selling the lands, are to be regarded as unappropriated territory, a door is open for incalculable mischiefs. Intruders upon the common waste would fall into endless broils among themselves, and involve the owners of the adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects for individual scramble, necessarily leading to violence and outrage."

The rule that the lands covered by such waters should not be public waste rests upon the ground of public policy, and it is in recognition of this rule that the lands underlying Chippewa Lake are considered to be the subject of private ownership. This being determined, the only question remaining is, What part of the lake shall be held to be the bound intended, when the lake generally is given as the boundary? As to streams, the center, or thread, is the established bound, where the language of the deed does not contradict such con-

struction, because the center is the most conspicuous part. The water is a moving body, and as to the depth and breadth, is subject to constant change, which produces variations on the opposite sides. The thread, or current, however, shifts but little, and is, in the main, stationary, so that a line running to the thread would be a reasonably certain line, and would be easily ascertained. This is not true as to natural lakes and ponds. Such bodies do not have any thread or current. The water is the most conspicuous portion, but no rule of convenience or certainty requires that the line, where the lake itself is mentioned as the boundary, should be extended to the center. Indeed, the application of such rule would be attended, in most cases, with practical difficulties in the running of lines beyond the water's edge. If lakes were always found in the shape of a square, or a parallelogram, these difficulties would be slight, perhaps; but more frequently they are nearer a circular shape. The difficulties in such case are apparent. They may be theoretically overcome by an engineer on a diagram, but practically, in the water, they would always exist, and would prove a fruitful source of contention and quarrel.

The rule which, it is submitted, is the true rule is stated by Gresham, J., in *Indiana v. Milk*, 11 Fed. Rep. 389, as follows: "Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles without interference or confusion, and without serious injustice to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore-owners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when this rule is attempted to be applied to lakes and ponds, practical difficulties are encountered. They have no current, and being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore-owners in the beds. Beaver Lake is seven and a half miles east and west, and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. I do not think the mere proprietorship of the surrounding lands will, in all cases, give ownership to the beds of natural non-navigable lakes and ponds, regardless

of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for all the small surrounding fractional tracts,—the mere rim."

In my view, there is no difference, in law, in the two cases now under consideration, and a like judgment should be rendered in each. But the judgment in the case of Nye is assented to as the best practical solution under the circumstances.

HUNTING RIGHTS.—Every person has an equal right of taking, for his own use, all creatures fit for food that are wild by nature, so long as he does not injure another in the enjoyment of his rights; but as every person has the right of exclusive dominion over his own lands, no other person or persons can hunt or sport upon his land except by his permission. This rule applies equally to lands covered by water, as well as upland: *Sterling v. Jackson*, 69 Mich. 488; 13 Am. St. Rep. 405, and particularly note 416-420.

(CONVEYANCES OF LANDS LYING ADJACENT TO NON-NAVIGABLE WATERS.)—The grantee of land bounded upon a non-navigable stream takes to the thread of the stream: *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88; *Williams v. Buchanan*, 1 Ired. 535; 35 Am. Dec. 760, and note; *Loisell v. Robinson*, 16 Me. 357; 33 Am. Dec. 671; *Muller v. Landa*, 31 Tex. 265; 98 Am. Dec. 529; *State v. Columbia*, 27 S. C. 137; *Menasha etc. Co. v. Lawson*, 70 Wis. 600. And his title cannot be limited to the edge of the stream, unless there is an expressed intention in the deed to that effect: *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413, and note. But compare *Wiggenhorn v. Kountz*, 23 Neb. 690; 8 Am. St. Rep. 150; *Branham v. Turnpike Co.*, 1 Lea, 704; 27 Am. Rep. 789, and note. Lands bounded by a pond extend to the margin of the water as existing when the conveyance is made: *Bradley v. Rice*, 13 Me. 198; 29 Am. Dec. 501; *Cook v. McClure*, 58 N. Y. 437; 17 Am. Rep. 270. And this rule was applied to a conveyance of land bounded upon a lake: *Trustees of Schools v. Schroll*, 120 Ill. 509; 60 Am. Rep. 575. But a deed to land bounded by a pond made by an artificial dam, through which the thread of the stream has always been apparent, passes title to the thread of the stream: *Phinney v. Watts*, 9 Gray, 269; 69 Am. Dec. 268; *Loisell v. Robinson*, 16 Me. 357; 33 Am. Dec. 671.

LAKES, DEFINITION OF: *Trustees of Schools v. Schroll*, 120 Ill. 509; 60 Am. Rep. 575. Lakes are not public waters unless navigable: *State v. Narrows I. Club*, 100 N. C. 477; 6 Am. St. Rep. 618.

TRESPASS CONTINUOUS IN ITS NATURE may be enjoined to prevent a multiplicity of suits and vexatious litigation: *Mills v. New Orleans S. Co.*, 65 Miss. 391; 7 Am. St. Rep. 671, and note.

PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY COMPANY v. SHIELDS.

[47 OHIO STATE, 387.]

MASTER AND SERVANT — RAILROAD'S LIABILITY FOR NEGLIGENCE OF SERVANT. — A railroad company is liable for the negligence of its servant in placing and leaving torpedoes, of which he has the custody, on its track at a point where the public, including children, are permitted to pass, notwithstanding such negligent acts of the servant are wanton, reckless, needless, and against the rules of the company.

MASTER AND SERVANT — CUSTODY OF DANGEROUS INSTRUMENT — LIABILITY FOR NEGLIGENCE OF SERVANT. — A person having in his custody instruments of danger must keep them with the utmost care, and one charged with such duty cannot devolve it upon his servant, so as to exonerate himself from the consequences of injury caused to others by the negligent manner in which the duty in regard to the custody of such instruments may be performed by such servant.

MASTER AND SERVANT — LIABILITY FOR NEGLIGENCE OF SERVANT. — Whatever the servant is intrusted by the master to do for him must be done with the same care and prudence that would be required of the master acting in that regard for himself. If it is the custody of dangerous instruments, the servant must observe the utmost care.

MASTER AND SERVANT — LIABILITY FOR NEGLIGENCE OF SERVANT OUTSIDE EMPLOYMENT. — A servant may depart from his employment without making the master liable for his negligence, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own.

MASTER AND SERVANT — LIABILITY FOR NEGLIGENCE OF SERVANT. — A servant cannot depart from a duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences of the negligence of the servant; nor is it necessary, to make the master liable, that there should be specific directions as to the particular act. It is sufficient if the general relation of master and servant within the range of such act exists, and that the wrong inflicted was incidental to the discharge of the duty with which the servant was intrusted.

MASTER AND SERVANT — LIABILITY FOR NEGLIGENCE OF SERVANT. — Where the master has a duty to perform, and intrusts it to his servant, who disregards it to the injury of another, it is immaterial, so far as the liability of the master is concerned, with what motive or for what purpose the servant neglects such duty.

Charles Darlington, for the plaintiff in error.

Foos, Fisher, and Foos, for the defendant in error.

MINSHALL, C. J. The suit below was an action by Shields, a small boy, prosecuted by his next friend, against the Pittsburgh, Cincinnati, and St. Louis Railway Company for an injury caused by the explosion of a torpedo, wantonly and negligently left on its track by one of its servants, at a point

where the children and inhabitants living along the line of the track were daily in the habit of passing with the knowledge and acquiescence of the company. The torpedo, a dangerous instrument, used by the company as a signal in the operation of its road, was picked up by a companion of the plaintiff, carried some distance away, and caused to explode by one of them hitting it. They were ignorant of its character, and at the time trying to satisfy their curiosity about it. The same accident caused the injury for which the original action in *Harriman v. Pittsburgh etc. R'y Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, was brought, the judgment in which was reversed by this court for error in sustaining a demurrer to the petition; and the petition in the Harriman case is substantially the same as in this case.

After the decision in the Harriman case, the defendant below filed an answer in this case, the second defense of which, and to which a demurrer was sustained, is as follows: "The defendant, for its second defense, says that it carries upon its trains signal torpedoes to be used in addition to its regular signals when from fog or other cause the other signals cannot be seen or relied upon, and that if said torpedo was placed upon the track, as alleged in said amended petition, by the employees of this defendant (a fact which defendant wholly denies), that then said employees placed the same upon the track at a time and place, in broad daylight, when and where there was no necessity for the use thereof, or of any signals of any kind whatsoever, and that said use was without the knowledge or consent or authority, express or implied, of the defendant; was against and contrary to its rules and regulations, as said employees well knew; and that said torpedo was so used by them outside and beyond the scope of their employment, and in no wise connected with the control, management, or operation of said train of cars or railroad, and was so placed for the accomplishment of an independent and wrongful purpose of their own, in this, to wit: that said employees, or one of them, while said train was taking water at said water-tank, for the purpose of having sport with some lady passengers who were upon said train, took torpedoes from the place where kept on said train, and without the knowledge of said lady passengers, with whom said employees were well acquainted, placed the same upon the iron rails of the track, in front of the wheels of the caboose in which said lady passengers were riding, with the intention to

frighten them by the sudden and unexpected explosion of said torpedoes, which would result with a loud noise by the passage of the caboose over them; when said train started forward, one of said torpedoes failed to explode, and was found as stated in said amended petition."

The sustaining of the demurrer to this defense is assigned for error. There is also an exception to the ruling of the court in refusing to charge as requested. But this ruling need not be noticed, as it presents simply the same question as is presented by the demurrer to the answer.

It would seem that the question raised by this defense was presented by the demurrer to the petition in the Harriman case, and determined by the decision of this court therein; the fourth proposition of the *syllabus* being, in substance, that the railroad company was liable for the negligence of its servant in placing and leaving the torpedoes on its track at a point where the public, including children, were permitted to pass, "notwithstanding such negligent acts of the servant were wanton, reckless, and needless."

But the counsel for the plaintiff in error think that it was not, and claim that there is clear error in the case, for the reason that the act of the conductor in placing the torpedoes on the track was a mere caprice of his own, outside of his employment as a servant, and contrary to the rules of the company, and that therefore the company is not liable.

We do not adopt this view, and shall show that the negligence of the conductor in this regard, though wanton and contrary to the rules of the company, occurred within his employment, and is therefore imputable to the company.

The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care: 1 Hilliard on Torts, 3d ed., 127. "Sometimes," says Pollock, "the term 'consummate care' is used to describe the amount of caution required; but," he says, "it is doubtful whether even this is strong enough. At least, we do not know any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him": Pollock on Torts, 407. See also Wharton on Negligence, sec. 851.

And it stands to reason that one charged with a duty of this kind cannot devolve it upon another, so as to exonerate himself from the consequences of injury being caused to others by the negligent manner in which the duty in regard to

the custody of such an instrument may be performed. Speaking of the absolute duty imposed by statute in certain cases, and also of the duties required by common law "of common carriers, of owners of dangerous animals or other things involving, by their nature or position, special risk or harm to neighbors," Pollock observes: "The question is, not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor,' but whether the duty has been adequately performed or not": Pollock on Torts, 64.

We in no way limit nor question the soundness of the general rule, which exonerates the master from liability for the acts of his servant done outside of his employment. What has been stated is strictly within the reason and principle of the rule, which is, that whatever the servant is intrusted by the master to do for him must be done with the same care and prudence that would be required of the master, acting in that regard for himself; if it be the custody of dangerous instruments, he must observe the utmost care.

The inability of the master to shift the responsibility connected with the custody of dangerous instruments, employed in his business, from himself to his servants intrusted with their use, is analogous to, and may be said to rest upon, the same principle as that which disenables him from shifting to an independent contractor liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded. It seems by the great weight of authority and reason that this cannot be done: See *Southern Ohio R. R. Co. v. Morey*, 47 Ohio St. 207, and cases there cited; also see *Lawrence v. Shipman*, 39 Conn. 586, 589, and Cooley on Torts, 2d ed., 644, 646.

And the relation of master and servant and that of employer and independent contractor are, in this regard, treated in one view by Pollock in his work on torts, as will appear from consulting his work, at page 64.

Now, in this case, it must be observed that the duty intrusted by the railway company to the conductor in regard to these torpedoes was, not only to use them as signals with the requisite care and caution, but to observe like care and caution in the custody of them when not in use. The servant's custody of them when not in use was as much a part of his employment as was the use of them as signals when required. In taking them from the place where they were carried when

not in use, and, in mere caprice, placing them on the track for the purpose of frightening the ladies, he was not, it is true, within his employment as to the use of them; but, in so doing, he violated the duties connected with his employment as the custodian of them, and thereby made his master liable for the consequences of his neglect, in the same manner and to the same extent as if it had been done by the company itself.

It is necessary in this and in all similar cases to distinguish between the departure of a servant from the employment of the master, and his departure from or neglect of a duty connected with that employment. A servant may depart from his employment without making his master liable for his negligence when outside the employment of the master; and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. But he cannot depart from the duty intrusted to him, when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master; otherwise the duty required of the master, in respect to the custody of such instruments employed in his business, may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of a neglect of the duty.

To better illustrate the ground of this distinction, we may, for example, suppose a servant, with others under his control, employed with a construction train repairing the track of his master. He may, for a time, quit his employment, and, with his men, go off on affairs of his own. Whilst thus out of the master's employment, he may build a fire, which, through his negligence, may consume the property of another; and, in the mean time, loss of life and property may result from a collision with the train negligently left standing on the track. Now, whilst, as has been held, the master would not be liable for the loss resulting from the fire, because the act was done outside the servant's employment (*Morier v. St. Paul etc. Ry Co.*, 31 Minn. 351; 47 Am. Rep. 793), yet it is equally certain that for the loss occasioned by the servant's negligence in leaving the train on the track the master would be

liable in damages, for the plain reason that in abandoning the custody of the train he was guilty of negligence in the employment of the master, whilst in building the fire he was not.

That what was done by the conductor contravened the purpose and instructions of the company in regard to the use of these torpedoes does not vary its liability for the negligence of the conductor in the custody of them. In discussing the master's liability for his servant, it is said by Professor Wharton: "It is not necessary, in order to make the master liable, that there should be specific directions as to the particular act. It is enough if the general relation of master and servant, within the range of such act, exists. The question is, simply, whether the wrong inflicted was incidental to the discharge of the servant's functions. It may have been capricious. It may have contravened the master's purposes or directions. But a master who puts in action a train of servants, subject to all the ordinary defects of human nature, can no more escape liability for injury caused by such defects than can a master who puts machinery in motion escape liability, on the ground of good intentions, for injury accruing from defects of machinery. Out of the servant's orbit, when he ceases to be a servant, his negligences are not imputable to the master. But within that orbit, they are so imputable, whatever the master may have meant": Wharton on Negligence, sec. 160; see also Wood on Master and Servant, sec. 283, and Cooley on Torts, 632 (*539).

The custody of these torpedoes was within the servant's orbit. Negligently leaving them on the track was a negligence within that orbit, and therefore imputable to the master. If a master has a duty to perform, and intrusts it to a servant, who disregards it to the injury of another, it is immaterial, so far as the liability of the master is concerned, with what motive or for what purpose the servant neglects the duty. This is illustrated by the case of *Weed v. Panama R. R. Co.*, 17 N. Y. 362, which was an action against the company for failure to carry the plaintiff to her destination with reasonable dispatch. The delay was caused by the willful act of the conductor in wrongfully detaining the train at a station, and which the defendant claimed exonerated it from liability. But the court held otherwise; it being observed, among other things, in the opinion, that "the obligation to be performed was that of the master, and delay in performance, from in-

tentional violation of duty by an agent, is the negligence of the master."

We do not see that this in any way conflicts with the decision in *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110; 2 Am. Rep. 373. There the plaintiff got into a quarrel with the baggage-master of the company about checking his baggage; and under the influence of anger, the latter struck the plaintiff with a hatchet, and it was held that the company was not liable for the injury. A hatchet is not an instrument of danger, within the rule above stated; it includes only such instruments as are such within themselves. The danger of a hatchet is in the hand and spirit of the man who may use it. If, in this case, the instrument left on the track had been a hatchet, the company would not have been liable to a child who might afterwards have picked it up and been injured by it; for the company would have been under no such duty as to its custody, as it was under in regard to this dangerous explosive.

Judgment affirmed.

MASTER AND SERVANT—LIABILITY OF MASTER FOR ACTS OF SERVANT.—

The master is responsible for the negligent or wrongful acts of his servant resulting in injury to others, when such acts are done in the general line of his apparent authority: *Cook v. Houston D. N. Co.*, 76 Tex. 353; 18 Am. St. Rep. 53; *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note. So held where the servants of a railway company negligently placed a torpedo at a point on the track, which the public, including children, had long been in the habit of crossing: *Harriman v. Pittsburgh etc. R'y Co.*, 45 Ohio St. 11; 4 Am. St. Rep. 507. But a company is not liable for the death of one who, while walking upon its track without permission, intermeddles with a torpedo placed there by servants of the company as a danger signal: *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20; 45 Am. Rep. 754.

FARMERS' CO-OPERATIVE TRUST Co. v. FLOYD.

[47 OHIO STATE, 525.]

AGENCY—PERSONAL LIABILITY OF AGENT ON UNAUTHORIZED CONTRACT

—**MEASURE OF DAMAGES.**—A person who without having in fact authority to make a contract as agent, yet does so under the *bona fide* belief that such authority is vested in him, is nevertheless personally responsible to those who contract with him in ignorance of his want of authority, and the measure of damages is the loss sustained by reason of not having the valid contract which the agent undertook to execute.

AGENCY—PERSONAL LIABILITY OF DIRECTORS OF CORPORATION FOR CONTRACT EXECUTED IN CORPORATE NAME.—Persons who, as directors of a corporation and in its name, contract with innocent third parties, be-

fore the legal amount of corporate stock has been subscribed, do not create any corporate liability, but become personally liable, although they contracted under the *bona fide* belief that corporate authority to do so was vested in them, and the measure of damages is the loss sustained by the innocent third party by reason of his not obtaining the valid contract which such directors assumed to execute.

John M. Cook, Estep and Estep, and A. H. Battin, for the plaintiff in error.

W. P. Hays and J. F. Daton, for the defendants in error.

WILLIAMS, J. The circuit court, it appears from the record, reversed the judgment of the court of common pleas, because of alleged errors in overruling the demurrers to the amended petition, and refusing the instructions which the defendants requested to be given to the jury. It sufficiently appears from the petition that in 1878 the defendants attempted to form, under the laws of this state, a corporation called "The Wool Growers' Exchange," for the purpose, as declared in the articles of incorporation, of dealing in "wool, merchandise, produce, and furnishing supplies to wool-growers and others, on commission, and purchase or sale, and to do a general commission business in the articles above enumerated; and also for the purpose of disseminating, through bureaus or journals, useful knowledge and information pertaining to the improvement and protection of wool-growing interests." The amount of the capital stock was fixed at fifty thousand dollars, in shares of ten dollars each. When less than three thousand dollars of stock had been subscribed, and less than two thousand dollars paid in, an election was held by the defendants and others, at which the defendants were chosen as directors of the concern. These directors organized, by selecting from their number the customary officers of a corporation. Thereafter, in 1882, while the defendants, against whom the judgment in the case was rendered, were acting as such directors, controlling and managing the business of "The Wool Growers' Exchange," wool was purchased in its name, from the plaintiff, to the amount averred in the petition; and the balance of \$3,195 of the purchase price, for which, with interest, the plaintiff recovered judgment, remains unpaid. The defendants had knowledge that ten per cent of the stock of the corporation had not been, and never was, subscribed or paid in, but the plaintiff was ignorant of that fact. There is no allegation in the petition that the defendants were actuated by any fraudulent purpose, or had

any design to cheat or defraud the plaintiff. Without such purpose or design, it is claimed that the defendants could not be made liable, and therefore the lack of such averment is a fatal defect in the petition. Whether it be so, or not, is the question raised by the demurrers. The instructions refused present a question somewhat different in form, though much of the same nature, which is, whether a personal liability was incurred by the defendants, if, in the transaction with the plaintiff, they acted in good faith, believing that the requisite amount of stock to authorize the organization of the corporation had been subscribed.

Upon both questions, the circuit court held with the defendants; and if its holding upon either was correct, its judgment must be affirmed.

A somewhat extended examination has satisfied us, however, that upon neither is the decision in harmony with the great weight of authority. The courts of this country and of England, with few exceptions, adhere to the doctrine so clearly laid down by Mr. Justice Story in his commentaries on the law of agency, where it is said: "Wherever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal. There can be no doubt that this is, and ought to be, the rule of law in the case of a fraudulent representation made by the agent, that he has due authority to act for the principal; for it is an intentional deceit. The same rule may justly apply where the agent has no such authority, and he knows it, and he nevertheless undertakes to act for the principal, although he intends no fraud. But another case may be put, which may seem to admit of more doubt, and that is, where the party undertakes to act, as an agent, for the principal, *bona fide*, believing that he has due authority, but in point of fact he has no authority, and therefore he acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice; for every person so acting for another, by a natural, if not by a necessary, implication, holds himself out as having competent authority to do the act, and he thereby

draws the other party into a reciprocal engagement. . . . If he has no such authority, and acts *bona fide*, still he does a wrong to the other party; and if that wrong produces an injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such an assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party, who has been misled by it. Indeed, it is a plain principle of equity, as well as of law, that where one of two innocent persons must suffer a loss, he ought to bear it who has been the sole means of producing it, by inducing the other to place a false confidence in his acts, and to repose upon the truth of his statements": Story on Agency, sec. 264. In the note to this section many cases which sustain the text are cited. And in the notes to *Thompson v. Davenport*, in Smith's Leading Cases, vol. 2, pt. 1, commencing on page 408 of the eighth edition, a number of cases on the same subject are collected. In addition to those, others might be referred to, among them the following: *Walker v. Bank of the State of New York*, 9 N. Y. 582; *White v. Madison*, 26 N. Y. 117; *Weare v. Gove*, 44 N. H. 196.

In the last case cited above, it is held that "although no fraud or wrongful motive can be imputed to the agent, still his act is an affirmation that he has authority to make the contract, and he may justly be held responsible for the truth of it; and it is no more than reasonable that he should suffer the consequences of his mistake, rather than the party who is misled by it, because, before holding himself out as such agent it is his duty to ascertain whether his claim so to act is well founded or not; and he surely cannot be heard complain that others have confided in his assertion of authority, and upon the strength of it have entered into reciprocal engagements with him. Even if wholly innocent of any wrongful purpose, his case falls within the familiar principle that when one of two innocent persons must suffer a loss, it ought to be borne by him who has been the means of causing it by inducing the other to confide in the truth of his representations."

While, however, the authorities generally agree that a person who without having in fact authority to make a contract as agent, yet does so under the *bona fide* belief that such authority is vested in him, is nevertheless personally respon-

sible to those who contract with him in ignorance of his want of authority, a diversity of opinion is found in the cases in regard to the exact nature of the liability, and the character of the action by which it may be enforced. In *Jenkins v. Hutchinson*, 13 Ad. & E. 746, it is intimated by Erle, J., that an action of deceit would lie in such cases, notwithstanding the good faith of the agent, and some authorities may be found to that effect. Another class of cases holds that the liability is upon the contract; but it is believed that whether the agent is so liable depends upon the intention of the parties as discovered from the contract itself, and on this question the form of the agreement and the mode of signature may be quite conclusive. The rule on this subject, as stated in Story on Agency, is, that an agent cannot be sued on the very instrument itself as a contracting party unless there be apt words to charge him: Sec. 264 a. Still another class of cases establishes the rule, which we are inclined to adopt, that in cases like the one we are considering, the agent is liable upon his implied promise that he possesses the authority he assumes to have: 2 Smith's Lead. Cas., 8th ed., pt. 1, 408, and cases there cited; *Lewis v. Nicholson*, 83 Eng. Com. L. 512.

In *White v. Madison*, 26 N. Y. 117, in a learned opinion, it is held that the liability of the agent in such cases rests upon the ground that he warrants his authority, and not that the contract is to be deemed his own.

Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596, is referred to as establishing both that the liability of the agent in cases of this kind is founded on fraud, and that the petition should charge a fraudulent intent in direct terms. That was an action in case for deceit, under the practice which prevailed before the adoption of the code of civil procedure. The questions arising upon the demurrer related to the form of the remedy, and the sufficiency of the declaration in such an action. They are stated by Birchard, J., to be: "1. Can a special action on the case for fraud, which has resulted in damage of the plaintiffs, be maintained in a case like this upon sufficient declaration? 2. Is this declaration good upon demurrer?" The court answers the first question in the affirmative, and in speaking of the declaration says: "The objection taken by counsel is a want of certainty. The action is founded on a fraudulent combination, and for holding out false colors at the commencement of the banking operations, and at various subsequent periods. The only direct charge of

a fraudulent intention is in the withdrawal of the funds, and this, for aught that appears, may have been long since the bills in plaintiff's hands were issued. . . . It is thought that the averment of a fraudulent design should have been made in positive terms, as to each specific act relied upon to sustain the action." Under the practice then in force, pleadings were subject to demurrer, unless they were appropriate in their form and allegations to the particular action pursued; and we do not understand it to be there decided that no other action could be maintained on the facts of that case. A different action was maintained in *Medill v. Collier*, 16 Ohio St. 599, which, so far as the grounds upon which the liability of the bank directors was placed, is not greatly dissimilar to the case before us.

Under our present system of pleading, it is not important what was formerly the most appropriate remedy. Upon the facts stated in the petition, the law, we think, implied a promise on the part of the defendants that in making the contract with the plaintiff they had authority to bind the corporation they assumed to represent; and if they had not, they are answerable for the consequences. That they were without such authority seems clear. It was held by this court in *Bartholomew v. Bentley*, 1 Ohio St. 37, that while mere irregularities in organizing a corporation would not subject the officers to private liability, to protect them from such liability, the provisions of the act of incorporation must be substantially pursued. By our statutes, under which the proceedings were taken for the formation of the corporation referred to in the petition, the corporate powers, business, and property of corporations formed for profit must be exercised, conducted, and controlled by a board of directors, all of whom must be stockholders; the articles of association must state the amount of the capital stock and the number of shares into which it is divided, and at least ten per cent of that amount must be subscribed before directors can be chosen. So that the subscription of the necessary amount of the capital stock to authorize the election of directors is not only a matter of substance, but is essential to the organization of the corporation, and necessary to the transaction of business by it. It is the security which the law requires shall be provided before the corporation enters upon its business, for the protection of those who may deal with it. The statutory liability of the stock subscribers is an additional security. In the effort to form the corporation in question,

neither of these securities was provided. Counsel contend that it is nevertheless a corporation *de facto*, and estopped to deny its liability to the plaintiff. If it were, it is not readily perceived how this would aid the defendants. Until there were stock subscriptions to an amount warranting the organization, the subscribers could not be compelled to pay beyond the sum required at the time of the subscription; nor would the statutory liability attach, unless there were some ground of estoppel not appearing in this case. The implied undertaking of the defendants was, that they represented a corporation with the capital stock required by law; while the one to which they insist the plaintiff shall be compelled to resort was, if a *de facto* corporation, so only in name, without substance or capacity; and if the doctrine of estoppel could be brought to the aid of the plaintiff against it, the defendants are not in a position to require a resort to that remedy to relieve them from the liability they have incurred.

The case appears to have proceeded in the trial court upon the theory that if the defendants were liable at all, the amount which the plaintiff was entitled to recover was the balance due on the contract. This was not necessarily the measure of recovery. As we have already seen, the action in such cases is not founded on the contract made for the supposed principal, but on the implied promise of the agent that he had authority to bind the principal; and the damages which may be recovered for its breach is the loss sustained by the plaintiff by reason of his not having the valid contract which the agent undertook that he should have. The damages may sometimes exceed the amount due on the contract made in the name of the principal, for it is held they may include the costs and expenses of an unsuccessful action against the principal to enforce the contract: *White v. Madison*, 26 N. Y. 117; *Simons v. Patchett*, 7 El. & B. 568; *Collen v. Wright*, 7 El. & B. 301; 2 Smith's Lead. Cas. 410.

In *Morawetz on Corporations* it is said that the measure of damages, in an action against the directors or officers of a corporation who induce a person to deal with it before the capital indicated in its charter has in fact been provided, is the loss sustained "by reason of the difference between the capital which he actually received and that which he was entitled to expect." Under this rule, we think the plaintiff might properly recover the balance remaining unpaid on the purchase price of the wool sold. *Prima facie*, that is the

amount of the plaintiff's loss, and it does not exceed the amount of the capital which the corporation was required by law to have before it could be represented by directors, and which the defendants, by assuming to act for it, undertook that it did have. It is true, the petition alleges that the corporation is insolvent, with an indebtedness exceeding ten per cent of the capital stock; but whether the claims of other creditors stand upon a like footing with that of the plaintiff, or can or will be enforced against the defendants, does not appear. Besides, if the proper stock subscriptions had been obtained, the corporation might not have become insolvent; or before it did, the plaintiff's claim might have been paid or secured. If, in such case, the plaintiff could recover no more than a sum equal to the proportion of the capital which should have been provided that his claim bears to the whole indebtedness contracted in the corporate name, it would be necessary to take an account of the assets and liabilities to determine the amount of the recovery. That rule, applied to this case, would require that the defendants be charged with an amount equal to the necessary stock subscriptions and the statutory liability of the subscribers, and that all the creditors be brought in to have their claims adjusted before the amount of the verdict could be arrived at. The plaintiff has not sought to compel the defendants to provide a fund for the payment of other creditors who are not themselves asserting their claims, nor have the defendants complained because they were not compelled to do so. Whether the defendants could, in the trial court, if they had deemed it to their advantage, have had the claims of all the creditors adjusted, the aggregate liabilities ascertained, and the total amount the defendants could be called upon to pay, determined and apportioned among the creditors, we need not decide. They did not make that claim in the court below, nor do they make it here.

In our opinion, the court of common pleas committed no error in overruling the demurrers to the petition, nor in refusing the instructions requested by the defendants.

The judgment of the circuit court is reversed, and that of the court of common pleas affirmed.

AGENCY—LIABILITY OF AGENT UPON AN UNAUTHORIZED CONTRACT.—Whenever a person assumes to contract as the agent of a corporation or a person, he must be sure that his principal is legally bound by the contract; for failing to contract so as to bind the principal, he renders himself liable: *Kocher v. Walcott*, 83 Mich. 200; *ante*, p. 595, and *note*.

HERRON v. HERRON.

[47 OHIO STATE, 544.]

MARRIAGE AND DIVORCE — GROWING CROP, WHEN WILL PASS AS PART OF ALIMONY. — A crop of wheat, sown on land by the husband as owner, after the commencement by his wife of a suit for divorce and alimony against him, passes to the wife as a purchaser, by a decree which gives her the land in dispute, and does not, in terms, describe or refer to the wheat.

McGillivray and Coultrap, for the plaintiff in error.

Rannells and Darby, for the defendant in error.

SPEAR, J. The question in this case is, whether a crop of wheat, sown on land by a husband after the commencement by his wife of a suit for divorce and alimony, passes to the wife by a decree which gives her the land as alimony, but which does not, in terms, describe or refer to the wheat.

Our statute relating to alimony provides that where divorce is granted for the aggressions of the husband, the wife shall be allowed such alimony out of her husband's real and personal property as the court shall deem reasonable, having due regard to the property which came to him by the marriage, and the value of his personal estate at the time of the divorce. It was therefore competent for the court to adjudge this land to the wife as alimony, with the growing crop or without.

Growing crops, the annual result of agricultural labor, are part of the land in some cases, and in some not. Some text-writers say that they are in most cases part of the land. They appear to partake of the nature of realty, inasmuch as they have root in the soil itself, and take up and absorb the substance and strength of the land while growing; and at the same time, of personalty, as the land must be prepared and the seed sown by the husbandman, and the seed is personalty. This court has said (*Baker v. Jordan*, 3 Ohio St. 438) that they are generally to be considered as personalty. And yet, in a later case, *Youmans v. Caldwell*, 4 Ohio St. 72, Kennon, J., says "they are generally to be considered as part of the realty." Such crops are subject to levy and sale on execution. They may be sold without writing, and the title will pass. On the death of the ancestor they go to the personal representative, and not to the heir; this because they are treated as the result of labor and outlay incurred at the expense of the ancestor's personal estate. They will not, in

this state, pass with the land, at judicial sale nor at partition sale. So, too, such crops may be reserved by parol by the grantee who conveys the land, and if the parties to the deed signify their understanding that, as between them, the crop is personalty, the law will so regard it: *Baker v. Jordan*, 3 Ohio St. 438. But in case of sale and conveyance by the owner of the land, such crops, where sown by him, as between vendor and vendee, pass with the land, unless reserved. A reason given for this rule is, that the deed is to be construed most strongly against the grantor, and if the crop be not reserved, the grantor is presumed to have intended it to pass with the possession. A further reason is found in the fact that if it were otherwise the purchaser of land would be subject to the intrusion of the vendor to gather the crop. In the absence of a reservation of the right to do this, such intrusion would be a trespass, and the anomalous situation would be presented of the ownership by one of personal property upon the land of another, without right in the owner to enter and take it.

In the case before us there can be no presumption against the husband of intent to pass title to the wheat, for he resisted the wife's claim throughout. On the other hand, the crop cannot be treated as an away-going crop, or emblements, and for that reason personalty, for no relation of landlord and tenant exists between the parties. On the contrary, every relation has been severed by the decree of divorce. Nor do the cases declaring the law as to judicial sales control this case. The reason given for excluding growing crops from judicial sales is, that all lands before exposure to sale are required to be appraised, and the sale to be made for a sum bearing some proportion to its appraised value. Annual crops are not included in such appraisal, and hence to include them in the sale would be to give to the purchaser property which had not been subject to appraisal; and that the debtor's rights can only be protected by regarding the annual crops as personalty requiring a separate levy: *Cassilly v. Rhodes*, 12 Ohio, 96. This rule must be taken as an exception to the ordinary rule on the subject, for in states where lands are sold at judicial sale without appraisal, growing crops are uniformly held to pass to the purchaser, and in Indiana, where the appraisal laws are similar to ours, they are, nevertheless, held to pass with the land. So it has been held in other states

that as between mortgagor and mortgagee, where the latter obtains the absolute estate in fee of the mortgaged premises by becoming the purchaser under a foreclosure and sale, he is entitled to the growing crops, and may maintain trespass against the mortgagor or his lessee for taking them away: *Lane v. King*, 8 Wend. 584; 24 Am. Dec. 105; *Shepard v. Philbrick*, 2 Denio, 174; *Jones v. Thomas*, 8 Blackf. 428. See also 4 Kent's Com., 157.

From the foregoing it may be concluded that, as a general proposition, where the title and possession of land is transferred from one to another in such way as to clothe that other with a full title, the annual growing crops will pass, unless the circumstances indicate a purpose to reserve them.

In the light of this principle, let us examine the case before us. The decree of the court granting the wife a divorce was absolute. Henceforth their ways parted, and in law they were strangers. Considerations of propriety and public policy required, therefore, that as their personal relations had been severed, their property rights should in the future be separate and distinct. In this spirit the decree for alimony was made absolute. The court might have limited the estate, or the possessory rights, of the wife in the land, but it chose not to do so. The land was allowed to her as reasonable alimony, without reservation or qualification. No appraisal was had, or was necessary. Presumably, the court heard proof as to the extent and value of the husband's possessions, and as to their condition, and was made aware of every circumstance which would enhance the value of those possessions. At least, it was the defendant's privilege, not to say duty, to acquaint the court fully with all facts which would enable the court to act intelligently in rendering judgment, and if he neglected that opportunity, it is too late now for him to seek to better his case. If a reservation of growing crops was desired, then was the time to speak, just as a vendor, when making conveyance and giving possession, must then speak.

The legal effect upon the allowance was to grant to the wife the entire interest of the husband in the land. It was not necessary that a conveyance should be made, because the decree itself operated as a conveyance, and the title passed to the wife *eo instanti*. This transfer of title was not by any act of the husband, but by the fiat of the court. Hence it is to the purpose of the court we must look, and not to the purpose

of the husband. The decree is not difficult of construction. It explains itself. The title received by the wife was as full and ample as though a conveyance from the husband had been made, and she took a title in fee-simple: *Galagher v. Fleury*, 36 Ohio St. 590. She took as a purchaser. "There are two modes only, regarded as classes, of acquiring a title to land, namely, descent and purchase; purchase including every mode of acquisition known to the law except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law": 3 Washburn on Real Property, 4. Being thus clothed with the full title to the land, and being by the decree put in immediate and unqualified possession of it, her control over it was absolute. She might allow the crop to remain undisturbed until ripened for the harvest, or she might plow it under for the enrichment of the land, or turn on stock to feed upon the young wheat. Any right in a stranger to interfere with this entire control would be inconsistent with the full title and possession which the decree gave her. Again, if the husband could rightfully sow a portion of the land in wheat after the divorce proceeding was commenced, and thus acquire a right to the crop, nothing would, where circumstances favored, prevent his sowing the entire farm in wheat, and thus delay the wife's possession from October — the date of the decree in this case — until the following summer.

Nor is this view, as we think, open to the objection that it discourages agriculture. The crop on the land enhances the value of it, and the greater the value of each acre the fewer in number of acres will the court, having due regard, among other things, to the value of the husband's real and personal estate at the time of the divorce, deem reasonable to be allowed to the wife. At all events, in such case, the husband sows with full knowledge that the land is liable to be adjudged to the wife, and that, when the crop ripens, he may have no right of entry to gather it. He is in the situation of a tenant who has by his own act brought his right of occupancy to a termination. He cannot claim profits, for it is by his own folly that he has sowed that which he could not reap.

We are of opinion that the decree gives the wife title to the land as a purchaser, and that she stands in regard to the crop of wheat in the attitude of a vendee receiving title and

possession from a vendor without reservation as to the growing crop, and hence the husband had no interest in the crop after the decree, and no right to enter upon the land to gather it.

Judgment affirmed. —

GROWING CROPS. — A purchaser at a foreclosure sale is entitled to the crops sown by the mortgagor: *Hayden v. Burkemper*, 101 Mo. 644; 20 Am. St. Rep. 643, and note. Growing crops are part of the realty, and pass to the vendee of the land: *Smith v. Leighton*, 38 Kan. 544; 5 Am. St. Rep. 778, and note. As to who is entitled to growing crops at an execution sale of land, see extended note to *Cress v. Pendleton*, 19 Am. Dec. 752-755; *Kessler v. Cornelison*, 98 N. C. 283.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

GREENOUGH *v.* SMALL.

[187 PENNSYLVANIA STATE, 132.]

ESTATES OF DECEDENTS — CONFIRMATION OF, IS INDISPENSABLE. — A sale, by the orphans' court, of the estate of a decedent for the payment of debts does not divest the title of the heirs until after confirmation thereof, and the execution and delivery of a deed by order of the court; and until such deed is delivered, an heir or his vendee may maintain ejectment against the purchaser at such sale, even though the latter has paid the purchase-money and has gone into possession.

EJECTMENT. The only fact not stated, and necessary to an understanding of the opinion, is, that the defendant, Small, as the purchaser at the sale made by the orphans' court, paid the purchase-money and went into possession of the premises sold before the sale thereof was confirmed, and a deed thereto executed and delivered by and under the order of such court.

William A. Sober, for the appellant.

S. P. Wolverton and Charles M. Clement, for the appellee.

CLARK, J. On the 9th of April, 1880, George B. Youngman died intestate, seised, *inter alia*, of the premises in dispute. The plaintiff's claim is for the undivided interest of one of the heirs at law of the decedent, sold upon execution and purchased by him at sheriff's sale; while the defendant's claim is as a purchaser of the decedent's title at an orphans' court sale by the administrators for payment of debts. Judgment was entered for the plaintiff. Whether this judgment was properly entered depends upon the decision of a single question, whether or not, after a sale of the decedent's title by the

orphans' court, for the payment of debts, not yet confirmed, but contested upon the ground that the personal estate is not insufficient for payment of the debts, an action of ejectment may be maintained against the purchaser for the interest of one of the heirs of the decedent. The orphans' court sale was made January 16, 1884; the ejectment was brought November 16, 1886, and judgment entered April 26, 1890, at which time the exceptions filed to the confirmation of the orphans' court sale were still undisposed of.

It is well settled that an orphans' court sale does not divest the title of the heirs until after confirmation thereof and conveyance delivered under the order of the court. In ordinary sales under articles of agreement between private parties, the sale, as to the vendor, works a conversion; equity regards that as done which the parties to the agreement have the power to do, and which they have agreed to be done: *Richter v. Selin*, 8 Serg. & R. 440. But orphans' court sales are made under the authority of the court; indeed, the sale is the act of the court, the administrator being only the hand of the court in making it: *Armstrong's Appeal*, 68 Pa. St. 409; and it is therefore subject to the approval and confirmation of the court. Such sales "are liable to be vacated," says Mr. Justice Strong, in *Demmy's Appeal*, 43 Pa. St. 168, "by a power superior to the purchaser, and against his will. The sale, even after confirmation, does not divest the title of the heirs of the decedent, for it remains in the power of the court until a deed has been executed and delivered. Until then, the heirs' right to maintain ejectment, even against the purchaser, has not gone: *Leshey v. Gardner*, 3 Watts & S. 314; 38 Am. Dec. 764. Until then, no conversion takes place, and if the heir of the decedent die, even subsequently to the confirmation of the report of sale, but before the deed, his interest descends as land, and not as money: *Erb v. Erb*, 9 Watts & S. 147; *Biggert's Estate*, 20 Pa. St. 17. These cases recognize a clear distinction between sales made under order of an orphans' court and private sales. The latter are exclusively acts of the parties, and are beyond the control of any other power. The former are not the acts of the decedent or his heirs or devisees; they are the acts of the court, and they require no consent of the owners. In substantial fact, the purchaser buys from the court through its agent. The court reserves the power to decline his bid and to disannul the act of its agent, until the sale has been fully consummated." To the same

effect is *Overdeer v. Updegraff*, 69 Pa. St. 110; *De Haven's Appeal*, 106 Pa. St. 612. The bid of the buyer at an orphans' court sale is but an offer to the court, which the court may or may not accept, at its discretion: *Hays's Appeal*, 51 Pa. St. 58. If accepted, however, the title of the buyer may for some purposes, perhaps, have relation to the date of his purchase. An administrator's sale of land, under an order of the orphans' court for payment of debts, is worthless without confirmation, for the act of 1832 expressly requires it: *Morgan's Appeal*, 110 Pa. St. 271.

Even in the case of a sheriff's sale, the title of the debtor is not divested, nor can the purchaser maintain ejectment, or grant a lease of the lands, until the deed has been acknowledged and delivered: *Hall v. Benner*, 1 Penr. & W. 402; 21 Am. Dec. 394. It may be, as we said in *Holmes's Appeal*, 108 Pa. St. 23, although the title of the heirs is not divested, that the purchaser at an executor's sale, under an order of the orphans' court for payment of the decedent's debts, like a purchaser at a sheriff's sale, acquires an inceptive title or interest in the property at the time of the sale, which, if the sale be subsequently confirmed, and a deed delivered, may support the lien of a judgment; but *non constat* that this sale will ever be confirmed or a deed delivered. And certainly no one will seriously contend that this inceptive title, whether arising out of a sheriff's sale or an orphans' court sale, is sufficient to support a claim to the possession prior to its consummation by the confirmation of the court and the delivery of a deed. If a purchaser, when the property is struck down to him, may at once enter into the possession pending proceedings for confirmation, great confusion and embarrassment in the settlement of estates would certainly ensue; for, as he could be dispossessed only by ejectment, the heirs or executors would be subject to much delay and useless litigation. It is not every equitable right or interest in lands which entitles the owner of it to possession. In ordinary sales between individuals in their own right, a contract to sell does not, *ipso facto*, carry a right of possession until conveyance, unless the intention of the parties to that effect is manifest in the contract. "It is very common, it is true," says Mr. Justice Agnew in *Weakland v. Hoffman*, 50 Pa. St. 517, 88 Am. Dec. 560, "to let the purchaser in upon a sale, but we know of no rule of law by which the possession, so important a security to the rights of the vendor, shall pass from him without his covenant

or consent." See also *Smith v. Patton*, 1 Serg. & R. 84; *Baum v. Dubois*, 43 Pa. St. 260; *Irvin v. Bleakley*, 67 Pa. St. 28; and also the very recent case of *McGrew v. Foster*, 113 Pa. St. 642.

We are of opinion that the learned judge of the court below was right in his instruction to the jury, and that the judgment was properly entered.

Judgment is affirmed.

SALES OF DECEDENT'S REALTY — CONFIRMATION. — The right of the heirs to the land is as absolute as that of the ancestor, until divested by a valid sale to pay debts made under an order of the orphans' court: *McCoy v. Scott*, 2 Rawle, 222; 19 Am. Dec. 640, and note; and such a sale is not valid, and regarded as consummated, until confirmed by the court: *Rea v. McEackron*, 13 Wend. 465; 28 Am. Dec. 471, and note. Confirmation by the court is essential to the consummation of a judicial sale of realty: *Virginia etc. Ins. Co. v. Cottrell*, 85 Va. 857; 17 Am. St. Rep. 108, and note. Compare *State Nat. Bank v. Neel*, 53 Ark. 110; 22 Am. St. Rep. 000, and note.

OGDEN v. BEATTY.

[187 PENNSYLVANIA STATE, 197.]

SALE OF GOODS BY SAMPLE — MEASURE OF DAMAGES FOR BREACH OF WARRANTY. — Where goods are sold by sample, with a warranty of quality, and are retained by the purchaser, the measure of damages for a breach of the warranty is the difference between the market value of the goods contracted for and of the goods delivered; and in an action for the price of the goods, the purchaser may interpose this difference as a defense *pro tanto*.

SALE OF GOODS BY SAMPLE — SUFFICIENCY OF AFFIDAVIT OF DEFENSE IN ACTION FOR PRICE. — An affidavit of defense, setting up a breach of warranty in a sale of goods by sample, in an action for their price, must contain a clear and concise statement of the facts which constitute a basis for the assessment of damages under the rule by which they are measured. All the elements of the defense must appear with reasonable certainty in the affidavit, and if any fact essential to complete such defense is omitted, the affidavit is insufficient.

SALE OF GOODS BY SAMPLE — SUFFICIENCY OF AFFIDAVIT OF DEFENSE IN ACTION FOR PRICE. — An affidavit of defense, setting up a breach of warranty in a sale of goods by sample, in an action for their price, alleging great loss by reason of claims made by customers, and their cancellation of contracts because of the low grade and inferior quality of goods furnished, is insufficient, as failing to state the essential facts upon which to constitute a basis for the assessment of damages. Such affidavit should at least state the quantity, market price, and difference in quality of the goods purchased, and of the goods delivered.

SALE OF GOODS BY SAMPLE — PRESUMPTION AGAINST PURCHASER. — In an action for the price of goods sold by sample, it will be presumed, in the absence of averment and proof to the contrary, that the goods were inspected by the purchaser when he received them, and that he knew their grade and quality, and made no complaint as to either.

ASSUMPSIT on book-account for goods sold and delivered. A request to enter judgment for plaintiffs, for want of a sufficient affidavit of defense, was refused by the court, and plaintiffs appealed.

George H. Earle, Jr., and Richard P. White, for the appellants.

Josiah R. Adams, for the appellee.

McCOLLUM J. It is averred in the affidavit of defense that the notes and account in suit represent the price of yarn purchased by the defendant of the plaintiffs, by sample, which he exhibited to them; that the yarn delivered by the plaintiffs to the defendant was inferior in grade and quality to the sample shown, and that, in consequence thereof, he has sustained damage to the amount of many thousand dollars in excess of the sum demanded by the plaintiffs. It is to be noted that neither the quantity, market price, or quality of the yarn purchased, or of the yarn delivered, is stated in the affidavit. It contains, in general terms, a suggestion of a loss of custom and a cancellation of contracts as a result of a breach of warranty, but it is clearly deficient in the statement of specific facts on which to rest the legal conclusions invoked. It does not allege that the plaintiffs were manufacturers of yarn, that the defendant was a manufacturer of cloth, or that the former knew for what purpose the yarn was purchased by the latter. Its inferences and conclusions are not authorized by its facts. There is nothing in it on which to ground a claim for damages, embracing loss of custom or a cancellation of contracts.

Where goods are sold with a warranty of quality, and are retained by the purchaser, the measure of damages for a breach of the warranty is the difference between the market value of the goods contracted for and of the goods delivered. In an action for the price of the goods, the purchaser may interpose this difference as a defense *pro tanto*. If an affidavit of defense is required, it should contain a clear and concise statement of the facts which constitute a basis for an assessment of the damages under the legal rule by which they are measured. All the elements of a defense should appear with reasonable certainty in the affidavit, and if any fact essential to complete the defense is omitted, the affidavit is insufficient. In the present action, the defendant alleges that he has sustained great loss by reason of claims made

on him by his customers, and their cancellation of contracts with him, because of the low grade and inferior quality of the yarn; but he has not stated a single fact which would make these matters proper items of damage on a breach of the warranty. An affidavit so vague and evasive, and so radically wrong in its conclusions, upon the few facts it contains, cannot be approved. In the absence of an averment to the contrary, it is fair to presume that the yarn was inspected by the purchaser when he received it, and that he then knew its grade and quality, and made no complaint as to either.

The judgment is reversed; and it is ordered that the record be remitted to the court below, with direction to enter judgment against the defendant for such sum as to right and justice may belong, unless other legal or equitable cause be shown why such judgment should not be entered.

SALES BY SAMPLE. — AS TO THE EFFECT OF A SALE BY SAMPLE when the vendee has an opportunity to inspect the goods for himself, see note to *Bradford v. Manly*, 7 Am. Dec. 129. Compare *Gould v. Stein*, 149 Mass. 570; 14 Am. St. Rep. 455, and note, as to sales by sample generally. The vendee may rescind his purchase, upon discovering a latent defect in the goods bought by sample: *Hudson v. Ross*, 72 Mich. 363. In sales of goods by sample, there is always an implied warranty that the goods are of the kind and quality of the sample: *Brigham v. Reteladorf*, 73 Iowa, 712.

SALES — BREACH OF WARRANTY — DAMAGES. — The right to recover damages for the breach of an express warranty in the sales of chattels survives the acceptance of them by the vendee: *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40, and note; *Fogg v. Rodgers*, 84 Ky. 558. The measure of damages in an action for a breach of warranty of soundness is the difference between the value of the thing sold at the time of the sale, if it were sound, and the actual value thereof with the defects: Note to *Cary v. Gruman*, 40 Am. Dec. 303.

DATZ v. PHILLIPS.

[137 PENNSYLVANIA STATE, 208.]

SPECIFIC PERFORMANCE, PARTY SEEKING, MUST DO EQUITY. — Specific performance is not of right, but of grace, and one seeking such relief in equity must show himself ready and willing to do all that he ought in good conscience to do, and if he does not, his bill will be dismissed.

SPECIFIC PERFORMANCE, WHEN WILL NOT BE GRANTED. — Where a contract is not fair or the conduct of the party seeking its specific performance is not just and conscionable, or there are independent circumstances which will render the operation of a decree of specific performance harsh and inequitable, the parties will be left to their remedy at law.

SPECIFIC PERFORMANCE, WHEN WILL NOT BE GRANTED. — Specific performance of an agreement to close windows in a party-wall, upon receiving

one year's notice and one half the cost of erecting the wall, will not be granted in favor of a party who has violated his part of the agreement to furnish the building of defendant with certain sewer connections, in consideration of a surrender of an easement in plaintiff's land.

M. Hampton Todd, for the appellant.

James Aylward Develin and Theodore D. Rand, for the appellees.

WILLIAMS, J. The parties to this litigation own contiguous lots near the corner of Fourth and Arch streets, in the city of Philadelphia. The plaintiffs in the court below own Nos. 70 and 72 North Fourth Street. The defendant's lot was No. 410 Arch Street, which, extending beyond the corner lot owned by other parties, adjoined and formed the rear boundary of both the lots of the plaintiffs. On the back side of No. 70 there was a large privy well, some thirty feet deep and ten wide, to the use of which the defendant had a title which is not questioned, and to which he had access for himself and his tenants by means of an opening in the east wall of his building. Both parties were desirous to rebuild on their respective lots. Negotiations were had in regard to the privy well and the drainage for the new buildings, which resulted in an amicable arrangement by which Phillips was to surrender his right to the privy well, and permit the plaintiffs to fill it up and build over the ground. In exchange for the right thus relinquished, the plaintiffs were to provide Phillips with a suitable connection with the Fourth Street sewer under the south side of their building. He was to build, therefore, a solid wall on his east line, with no opening in it, which the plaintiffs could use as a party-wall in the erection of their block. This he did. The plan of the plaintiffs' building contemplated the use of this party-wall for their first floor, and a shortening of the stories above the first, so as to leave a recess or open area between the party-wall and the upper stories some ten or twelve feet wide. Into this area it was agreed that Phillips might open windows in the party-wall. So long as they were kept open, he was not to ask contribution towards the cost of the wall. If the plaintiffs wished the windows closed, they were to give Phillips one year's notice, and pay their share of the cost of the wall. This agreement was reduced to writing, at the instance of Phillips, and presented to the plaintiffs for execution. They made no objection to the contract as written, but delayed its execution until Phillips had completed his building

and then refused to sign it. They filled the well, and built over it up to and against the party-wall, but they refused or neglected to provide the sewer connection that was to take its place, and compelled Phillips to provide another connection with the sewer by a different route, and at a relatively large cost. The master has found that the written contract correctly recited the agreement actually made; that Phillips surrendered his right to the well, and complied with the contract on his part in regard to the manner of building the party-wall. He has also found the refusal of the plaintiffs to provide the promised sewer connection, and that Phillips has suffered injury in consequence, amounting to several hundreds of dollars. Upon this state of facts, the plaintiffs have come into a court of equity to ask that Phillips be compelled to close the windows opening into the area, in accordance with his agreement to close them upon a year's notice.

The learned judge who sat as a chancellor in this case made the decree asked for, treating the several stipulations that made up the general arrangement between these parties as severable and independent in their character. Such of them as were for the benefit of Phillips, and were to be performed by the plaintiffs, he left for a court of law to enforce in an action for damages; but a stipulation which was found by the master to be part of the general arrangement, which was for the benefit of the plaintiffs, he enforced by a decree in equity. This, we think, was wrong. If the case presented was one for specific execution, the equities of both parties should have been protected. But we think the plaintiffs were in no position to ask equitable relief. They set out in their bill so much of the general arrangement as related to the windows in the party-wall. The defendant replied, in substance, that the stipulation on which the bill rested was but a part of an agreement made before the work of rebuilding was begun; that under that agreement, he had surrendered his right to a privy well on the plaintiff's ground, and erected a party-wall with no opening in it on the first floor, against which the plaintiffs had built their new building; that, on the other hand, the plaintiffs had neglected and refused to keep the agreement on their part, and had neither provided him with a sewer connection, as promised, nor offered to make any substitute or compensation therefor. The report of the master showed the facts to be as alleged in the answer, and plaintiffs were thus found to be standing with both feet on their

own broken promises, asking a chancellor to compel Phillips to keep to the uttermost his promises towards them. But specific execution is not of right, but of grace; and he who seeks relief at the hands of a chancellor must show himself ready and willing to do all that he ought in good conscience to do: *Brightly's Equity*, sec. 218. If he does not, his bill will be dismissed. If the contract is not fair, or the conduct of him who asks its enforcement is not just and conscionable, or if there are independent circumstances which will render the operation of a decree of specific execution harsh and inequitable, the parties will be left to their remedies at law: *Brightly's Equity*, sec. 220. Whether the stipulations in the contract are severable or not is not the important question in this case, but whether the position and conduct of the plaintiffs are such as to give them any standing in a court of equity. They had secured the surrender by Phillips of his rights on their land, and the erection of a wall with no openings on the first floor as a party-wall, for which they had failed to make the promised return, and were still refusing to make any return whatever. Under such circumstances, they cannot be heard to ask equitable relief in regard to any part of the general arrangement. Having violated it themselves in every important particular, they cannot ask its specific execution at the hands of a chancellor. They must do equity before they ask equity.

The decree appealed from is now reversed and set aside, and the plaintiff's bill is dismissed, the costs in the court below and in this court to be paid by the appellees.

SPECIFIC PERFORMANCE. — As to what is necessary to give a court of equity jurisdiction to enforce the specific performance of contracts, see note to *Anderson v. Green*, 23 Am. Dec. 423-431. See also *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356; 18 Am. St. Rep. 278, and note; *Minneapolis etc. Ry. Co. v. Cox*, 76 Iowa, 306; 14 Am. St. Rep. 216, and note; *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404, and note. The party seeking specific performance must be free from all blame himself: *Kelly v. Central P. R. R. Co.*, 74 Cal. 557; 5 Am. St. Rep. 470. For he who seeks equity must do equity: *Yard v. Pac. Mut. Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 467. Courts of equity will not enforce the specific performance of contracts which are fraudulent, illegal, hard, or unconscionable: *Swoint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44; *Veth v. Giehl*, 92 Mo. 97; *Ramsay v. Gheen*, 99 N. C. 215; *Buckley v. Patterson*, 39 Minn. 250; *Eaton v. Eaton*, 64 N. H. 493; *Duncan v. Central P. R. R. Co.*, 85 Ky. 525; *Munnfeld v. Sherman*, 81 Me. 365; *Byars v. Stubbs*, 85 Ala. 256.

STEPHENS v. GIFFORD.

[187 PENNSYLVANIA STATE, 219.]

SALE OF CHATTEL, WHAT CONSTITUTES. — A sale of a chattel is the transfer of the property in it for a consideration, and is ordinarily effected by the delivery of the thing sold to the buyer, and the delivery of the price or a security therefor to the seller.

SALE OF CHATTEL INJURIOUS TO THIRD PARTY VOID. — Parties to a sale of a chattel may make such terms and conditions as are convenient to them, but when such terms and conditions are prejudicial to others, or are calculated to mislead the public, they are void as to those who would otherwise be injuriously affected by them.

SALE OF CHATTEL — RETENTION OF TITLE BY SELLER — INVALIDITY AS TO INNOCENT THIRD PARTIES. — The title to a chattel sold may remain in the seller as security for the purchase price by agreement of the parties, and so long as the rights of innocent third parties are not affected, it may be enforced according to its terms; still, as to innocent purchasers from and creditors of the buyer, such agreement gives him a deceptive appearance of ownership and a false credit, and will be disregarded.

SALE OF CHATTEL — POSSESSION AS PRESUMPTION OF OWNERSHIP. — When one has possession of personal property, those who deal with him on the credit thereof must inquire into the origin and nature of his possession as to whether or not he is a purchaser or a bailee, and when it is learned that he is a purchaser, his continued possession raises a presumption of continued ownership which is conclusive in favor of *bona fide* purchasers and creditors.

SALE OF CHATTEL — RETENTION OF TITLE — RIGHT OF INNOCENT PURCHASER. — Where the owner of goods sells them to one party and retains the possession, afterwards selling them to another innocent purchaser, who takes possession, the first purchaser loses his title, no matter if he acted in good faith, paid a fair price, and left the goods with the seller because of his confidence in and desire to aid him.

SALE OF CHATTELS — RETENTION OF POSSESSION AS EVIDENCE OF FRAUD. — Retention of possession by the seller, upon a sale of chattels, is not merely evidence of fraud, but in itself makes the transaction fraudulent as to subsequent *bona fide* creditors and purchasers from him.

SALE OF CHATTELS — CHANGE OF POSSESSION, HOW DETERMINED. — In deciding the sufficiency of possession taken by the purchaser of a chattel, to protect him against subsequent purchasers or creditors in good faith, the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business must all be considered.

SALE OF CHATTELS — SUFFICIENCY OF CHANGE OF POSSESSION. — The purchaser of goods must, for the protection of himself and the public, take such possession as is usual and reasonable, in view of all the circumstances of his purchase, where the property is capable of delivery; and as between himself and subsequent purchasers in good faith and creditors, he must bear the loss of his neglect in this respect.

SALE OF CHATTELS — SUFFICIENCY OF CHANGE OF POSSESSION. — A sale of horses and a wagon and harness under an arrangement by the purchaser with the seller that the former should have the use of the stable where

they were kept, and should continue to care for them until ready to remove them, with no other change of possession, is fraudulent and void as against a subsequent execution creditor of the seller.

C. George Olmstead and S. M. Brainard, for the appellants.

J. W. Sprout and A. F. Bole, for the appellee.

WILLIAMS, J. The character of the argument in this case leads us to believe that in some portions of the state there is a tendency to regard the authority of the earlier cases relating to fraud in law in the sale of personal property as seriously impaired, and to treat such sales as valid, or not, according to the finding of a jury upon the existence of fraud in fact in the transaction. It may be well, therefore, to examine our cases, in order to make their effect and the present state of the law upon this subject clear.

The distinction between real and personal property is familiar even to laymen. Such property as may attend the person of the owner is called personal. It is in his presence and possession, and under his control. The evidence of his ownership is, *prima facie*, in his actual hold on or possession of the articles, and proof of his possession makes a sufficient showing of title to sustain an action against a wrong-doer. A sale of a chattel is a transfer of the property in it for a consideration. It is ordinarily effected by the delivery of the thing sold to the buyer, and the delivery of the price or a security therefor to the seller. The transfer of the property in the thing is effected by the transfer of the thing itself to the possession of the purchaser. But while this is the general rule, it is true that parties may modify it within certain limits by their contracts, and may make sales on such terms and conditions as are convenient to them. But when such terms and conditions are prejudicial to others, or are calculated to mislead the public, they will be held to be void as to those who would otherwise be injuriously affected by them. It may be convenient for the parties to agree that the title to the thing sold shall remain in the seller as a security for the price to be paid; and so long as the rights of no persons but themselves are affected by it, the agreement may be enforced according to its terms. As to purchasers from and creditors of the buyer, however, such an arrangement gives him a deceptive appearance of ownership and a false credit, and for protection of such purchasers and creditors the private agreement between himself and his vendor will be disregarded. The reservation of the title, not-

withstanding an agreement of sale and an actual delivery in pursuance of it, may be good between the parties, but as to all persons dealing with the buyer without notice of the reservation, it is without force and void: *Rose v. Story*, 1 Pa. St. 190; 44 Am. Dec. 121; *Edwards's Appeal*, 105 Pa. 103. Such an arrangement cannot be sustained as a bailment. It is of the essence of a contract of bailment that the article bailed be returned, in its own or some altered form, to the bailor, so that he may have his own again: *Benjamin on Sales*, 6. In contracts of sale, however, the seller stipulates for a price as the equivalent of his goods. The buyer takes the goods as owner; the seller accepts the price in exchange for them. If the seller delivers the goods without demanding payment, he takes the risk of the integrity and solvency of the buyer. If the buyer pays the price without taking possession of his goods, he takes the risk of the integrity and solvency of his vendor, and a subsequent *bona fide* purchaser will take a good title. This was held in *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 346, followed, not long after, by *Babb v. Clemson*, 10 Serg. & R. 419; 13 Am. Dec. 684. The rule laid down in these cases has been recognized and applied in a long line of decisions extending from 1819 to the present year. Among these are *Streeper v. Eckart*, 2 Whart. 302; 30 Am. Dec. 258; *Eagle v. Eichelberger*, 6 Watts, 29; 31 Am. Dec. 449; *Young v. McClure*, 2 Watts & S. 147; *Barr v. Reitz*, 53 Pa. St. 256; *Crawford v. Davis*, 99 Pa. St. 576; *Miller v. Browarsky*, 130 Pa. St. 372.

The result of the cases seems to be, that when one comes into possession of personal property, those who deal with him on the credit of such property must inquire into the origin and nature of his possession, so as to know whether he is a purchaser or a bailee. When it is learned that he is a purchaser, his continued possession of the same goods affords a basis for the presumption of continued ownership, and this is a conclusive presumption in favor of *bona fide* purchasers and creditors. Under such circumstances there is nothing to suggest the necessity for further inquiry into the character of the possession, and for that reason there is no duty to make it. If, therefore, the owner of goods sells them to A, but retains the possession, and afterwards sells them to B, an innocent purchaser, who takes possession, the title of A is gone. It is of no consequence that he acted in good faith and paid a fair price, nor that his reasons for leaving the goods with his

vendor were such as grew out of his confidence in or desire to aid him. The fact that the goods were left in the hands of their former owner, with nothing to indicate that his relation towards them was changed, put it in his power to sell them again for a full price to an innocent purchaser. When he makes such sale, one of the purchasers must lose the money he has paid. Assuming that both are alike honest, on which of them ought the loss to fall? Clearly, on him whose act or omission has made or contributed to make the loss possible. This result is reached by treating the neglect to take possession as a constructive fraud upon the last purchaser, without regard to the existence of fraud in fact. The failure to take possession left the former owner in the same apparent relation to his goods as before, and made it possible for him to sell them again. The consequences to the second purchaser are the same, if the title does not pass to him, as though the first sale had been contrived for the express purpose of defrauding him of his money. Looking at results, the law declares the first sale to be a fraud as to subsequent purchasers and creditors, and so fixes the loss on the person who ought to bear it.

This rule was stated by the courts of the United States as early as 1803, in *Hamilton v. Russell*, 1 Cranch, 310. It had been applied by the English courts still earlier. The leading case in England seems to be *Edwards v. Harben*, 2 Term Rep. 587. The point in controversy in that case is thus stated in the opinion of the court: "This case has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and not such a circumstance, *per se*, as makes the transaction fraudulent in point of law"; and the court held, adversely to the position of defendant's counsel, that a sale of personal goods without a delivery of possession was a fraud, in law, upon a subsequent *bona fide* purchaser. The controversy over the point raised in *Edwards v. Harben*, 2 Term Rep. 587, has been continued on both sides of the Atlantic, and in some courts is still an open one. In some of the states it has been settled by statute. In New York, the statute provides that "every sale made by a vendor of goods and chattels in his possession or under his control, . . . unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, . . . shall be presumed to be fraudulent and void as against the creditors . . . of the ven-

for, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the person claiming under such sale that the same was made in good faith, and without any intent to defraud such creditors or purchasers." Under this statute, the courts of New York must, in all cases where the conflict is between a first and a subsequent purchaser, submit the *bona fides* of the conduct of the first purchaser to a jury, with an instruction to sustain his title, regardless of the want of a delivery, unless his conduct was fraudulent in fact. Similar statutory provisions exist in several other states, and the course of decision in such states has been controlled by them. Our own legislature has refrained from any interference with the rule so well settled by the courts, and so just and salutary in its operation. It still rests, therefore, on the same foundation on which it was originally put, as appears by the recent case of *Miller v. Browarsky*, 130 Pa. St. 372, decided in November last. This court said, in that case, that the law imputes fraud to the first purchaser because of his laches. His neglect to do what he ought to have done for the protection of others requires that he should be postponed in favor of those who must otherwise lose by his conduct. His motives are not material. The consequences of his neglect to take possession are none the less serious to subsequent purchasers because no harm was intended. His liability grows out of his acts or omissions, not out of his intentions. Assuming that his conduct is free from actual fraud, yet he, or the subsequent vendee, must lose, and it is a proper case for the application of the maxim of the common law, that when a loss must fall on one of two innocent persons, it ought to fall on him whose act or omission caused it.

It is, as we have seen, well settled in this state that it is the duty of the purchaser of personal property to take possession of the goods purchased; but the question remains, What is a sufficient taking of possession to protect the purchaser? This question has been answered in a line of cases which begins with *Eagle v. Eichelberger*, 6 Watts, 29; 31 Am. Dec. 449. In that case this court said that the duty of the purchaser was affected by the nature of the transaction, and that a delivery in accordance with the usages of the trade or business in which the sale was made was a sufficient delivery. In *Hugus v. Robinson*, 24 Pa. St. 9, it was further said that the delivery must be such as usually and naturally attends such a trans-

action, and that the purchaser taking such possession has fully discharged his duty to the public. *Barr v. Reitz*, 53 Pa. St. 256, presented the question on a new state of facts. The owner of household goods sold them, moved out of the house in which they were, and delivered the keys to the purchaser. We held, on these facts, that the previous visible relation between the owner and his goods was broken. Whether the goods were removed from the house in which the owner remained, or the owner removed from the house where the goods remained, the visible relation between them was broken, and the public was put on the duty to inquire. *McMarlan v. English*, 74 Pa. St. 296, was the case of a sale of a stock of goods in a store, of which possession was taken in bulk. This was held sufficient, and it was said that, in fixing upon the duty of the purchaser, the nature of the property, the relation of the parties to it and to each other, must be considered, and the possession taken of the stock must be such as was usual in such cases, and consistent with the nature and situation of the goods, looked at in connection with the business for which they were held. In *Evans v. Scott*, 89 Pa. St. 136, it appeared that two brothers lived together in the same house. One owned all the furniture. The other bought a carpet on credit which was laid in the house. When the credit expired, he did not pay for it. The other then went to the seller, paid the price, and had a bill of sale made to himself. This was held to give him a title, and it was said that, in considering the question of possession, his relation to the house and its furniture must be taken into the account. The results of these cases were summarized in *Crawford v. Davis*, 99 Pa. St. 576, where it was said that the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of the trade or business are all to be considered in deciding the sufficiency of the possession taken by the purchaser. This was repeated in *McClure v. Forney*, 107 Pa. St. 414, and in *Kenninger v. Spatz*, 128 Pa. St. 524; 15 Am. St. Rep. 692.

Another line of cases began with *Linton v. Butz*, 7 Pa. St. 89, 47 Am. Dec. 501, in which it was held that the purchaser was not bound to take actual possession, where the vendor was not in possession at the time of the sale. In that case, the article sold was in the hands of a bailee, and the delivery of an order on him for it was held to be a sufficient delivery of the article. So goods in the hands of a carrier, or stored

in a warehouse, may be delivered by a delivery of the bill of lading or the warehouseman's receipt: *Bond v. Bunting*, 78 Pa. St. 210. All these cases recognize the rule, while they qualify it as the circumstances require in order to make its application just. The general rule undoubtedly is, that the purchaser of goods must, for the protection of the public, take such possession as is usual and reasonable in view of all the circumstances of his purchase. If he neglects this obvious duty, then, as between himself and subsequent vendees or creditors, he must bear the loss resulting from his neglect.

Such being the law in this state, it only remains to apply it to the case before us. The property in controversy is a pair of horses, harness, and wagon. The former owner was Mulkie; the present claimant is Stephens. Mulkie owned an oil refinery in Corry, which was inclosed with a high fence. Among the buildings in the inclosure was one used as a barn, in which the horses, harness, wagon, and some other property of Mulkie were kept. The horses were groomed and driven by Keefer, an employee of Mulkie, who also carried a key to the barn. Stephens was a cooper, living in Titusville, who supplied the refinery with barrels. In May, 1888, he met Mulkie in the street, in Corry, who proposed to sell him the horses, harness, and wagon, to apply on his account for barrels. The property was not present, and Stephens did not go to see it or make any bargain for it. On the 29th of May, as he testifies, he wrote from Titusville, proposing to take the property on account at \$550. Three days later, a *feri facias* was issued against Mulkie, and the property was seized and sold by the sheriff as his. When seized the property was in Mulkie's barn on the refinery property, under the care of Keefer. Stephens brought this action to recover the value of the property. It is not alleged that he ever took possession of the property in person, or that he sent any one to take possession for him, but he claims to have been in actual possession by force of the following circumstances, viz.: (a) That he had an arrangement with Mulkie for the use of the stables until he should be ready to move the property; (b) That he had an arrangement with Keefer to continue to care for it; (c) That Keefer carried the key to the barn. By virtue of these arrangements, he urges that he became a lessee of the barn, an employer of Keefer, and a purchaser in actual possession of the property. But what change had taken place in the relation between Mulkie and his property? The barn remained within his inclosure. The property remained in the

barn. Keefer remained in care of it. There was not the slightest visible change in any particular in the relation of Mulkie to the barn, the personal property, or the employee in charge of it. Keefer carried the key and drove the team, after the letter of May 29th, just as before. The team was kept in the same place inside the refinery yard, and Mulkie was in the same visible possession of the refinery. The property was capable of an actual delivery, and was such as usually and naturally passes to a purchaser by delivery. It was the duty of Stephens to take possession of it in the manner that is usual upon a sale of such articles, so that the visible relation between the former owner and the goods should be changed. Failing to do this, he must not complain of the consequences.

The law was well stated in the defendant's fourth, tenth, eleventh, and twelfth points, by which an instruction to the jury was asked, to the effect that if there was no visible change of possession, the sale was fraudulent in law, notwithstanding the jury might find that Stephens and Mulkie had acted honestly in the transaction. The learned judge refused so to charge, and in answer to defendant's third point told the jury that the public was bound to make "proper inquiry" about the title to the property, overlooking the fact that the evidence disclosed no reason for inquiry, or for doubting the continued ownership of Mulkie. This instruction seems to have been influenced by a supposed analogy between this case and *Barr v. Reitz*, 53 Pa. St. 256. In that case the seller moved out of the house in which he had been living, and in which the goods were, and delivered the keys of the house to his vendee. His former relation to his goods was visibly broken, and the public was thereby put upon inquiry. In this case Mulkie remained in possession of the refinery; the property remained in the stable within the inclosure; the key was carried by the same person, who went out and in just as before; and so far as the public could see or know, there was no change in the relation previously existing between Mulkie and his stable, or the property in it, or the hired man in charge of it. There was no delivery of possession to Stephens, and as against subsequent purchasers and creditors, he had no title.

The judgment is reversed.

SALE OF CHATTEL, WHAT CONSTITUTES — As to what things are essential to the consummation of a sale of a chattel, see *Love v. State*, 78 Ga. 66; 6

Am. St. Rep. 234, and note; *Greene v. Lewis*, 85 Ala. 221; 7 Am. St. Rep. 42, and note.

SALES OF PERSONALTY—RETENTION OF POSSESSION BY THE VENDOR.—As to the effect of a sale of personal property, when possession is not delivered to the vendee, but retained by the vendor, where the rights of third persons are involved, see *Benninger v. Spots*, 128 Pa. St. 524; 15 Am. St. Rep. 692, and particularly note 694-696. An actual and continued change of possession is necessary to the validity of sale of personalty, as against the vendor's creditors: *Gould v. Hussey*, 73 Cal. 399; *Schumacher v. Connolly*, 75 Cal. 282; *Rudolf v. Givens*, 76 Cal. 457; *Tunell v. Larsen*, 39 Minn. 269; *Siedenbach v. Riley*, 111 N. Y. 560. But the presumption of fraud from a want of delivery of the chattel to the purchaser may be rebutted by the proper evidence: *Fitzgerald v. Meyer*, 25 Neb. 77. Compare *Peabody v. Landon*, 61 Vt. 319; 15 Am. St. Rep. 903, and note 912-917.

CLEMENT v. CITY OF PHILADELPHIA.

[137 PENNSYLVANIA STATE, 528.]

MUNICIPAL CORPORATION—RIGHT TO SET OFF JUDGMENT DEBT AGAINST CONTRACTOR.—Where a person who is doing work for a city under contract is also a judgment debtor of such city, the latter can require him to complete the work according to the contract, and in an action for the price can set off its judgment against him, notwithstanding the fact that he borrowed money to pay for labor and materials to complete the contract.

MUNICIPAL CORPORATIONS—RIGHT TO SET OFF JUDGMENT DEBT AGAINST CONTRACTOR OR HIS ASSIGNEE.—Where a contractor doing work for a city is also its judgment debtor, and consents that it shall set off part of the contract price in payment of its judgment, an agreement, of which the city is ignorant, between the contractor and his surety, that the latter is to receive, as security for advances made by him, all warrants for money to become due on the contract does not give the surety an equitable or legal claim superior to the city's right of set-off. Hence the surety cannot recover of the city the money so appropriated in satisfaction of its judgment.

MUNICIPAL CORPORATIONS—RIGHT TO SET OFF JUDGMENT DEBT AGAINST CONTRACTOR OR HIS SURETY AND ASSIGNEE.—Where a city contractor is also the judgment debtor of the city, notice to the latter of a power of attorney, empowering the surety of the contractor to receive all warrants coming to the latter, is not notice of the surety's interest for advances made on the contract, and imposes no duty on the city to notify him of its judgment against the contractor, or to relinquish its right of set-off against the money due on the contract.

David W. Sellers and William Nelson West, for the appellant.

Abraham M. Beidler and Charles F. Warwick, for the appellee.

McCOLLUM, J. Clement, while indebted to the city, entered into a contract with it to complete the repairs to South Street

bridge, and he performed the work according to his agreement. A portion of the contract price was applied, with his consent, to the payment of his debt to the city. Josephs, who was his surety on the bond accompanying the contract, brings this action to recover the amount so applied, alleging that he has an equitable claim to it superior to the city's right of appropriation or set-off. When he became surety, and before any work was done under the contract, he received from Clement a letter of attorney, which he filed with the city controller. By it he was authorized to receive all warrants which might be coming to Clement under his contract with the city. It constituted Josephs the attorney in fact of Clement for this purpose, and this was the scope of the power conferred by it.

It now appears that there was an agreement between Clement and Josephs, by which the latter was to advance to the former, from time to time, the funds necessary to pay for the work and materials needed to complete his contract with the city, and as compensation therefor was to receive "half the net profits of the said Clement on the said contract." As security for his advances, Josephs was to "receive all warrants for moneys to become due to the said Clement from the city, for or on account of the said work," and from the moneys arising from said warrants he was authorized to retain the amount of his advances and compensation. The city was not advised of this agreement, nor of the loan made in pursuance of it. It knew that Josephs had signed the bond of Clement, and that he held the power of attorney mentioned, but it had no reason to suppose that he was interested in the contract or the moneys arising therefrom. It owed him no duty to give notice that Clement was its debtor, or to relinquish its right of set-off.

The money furnished by Josephs to Clement in pursuance of their agreement was a loan under the act of April 6, 1870 (P. L. 56), to be compensated by a share of the profits on the bridge contract, in lieu of interest on the sums advanced, and the rights of the city under its contract with Clement were not impaired by it. The city could require Clement to complete the work according to his agreement, and, in an action for the price of it, set off its judgment against him: *Metzgar v. Metzgar*, 1 Rawle, 227; *Jacoby v. Guier*, 6 Serg. & R. 448; *Filbert v. Hawk*, 8 Watts, 443; *Lloyd's Appeal*, 95 Pa. St. 518. The claim against the city is founded on Clement's performance of his contract, and the fact that he borrowed money to pay for labor and materials to complete it cannot enlarge the claim

nor destroy the defenses to it. It was Clement's money, and the sum which he could recover in a suit on his contract, which Josephs was authorized to receive from the city, and this was the only right against the city which the power of attorney and the agreement to secure his advances and compensation gave him.

In *Philadelphia v. Lockhardt*, 73 Pa. St. 211, the contractor had assigned all moneys due and to become due under his contract with the city, to Pyle and Hansell, who, on the faith of the assignment, furnished the lumber for the building, accepted orders from and acted as trustees for all the mechanics and material-men, and virtually assumed and discharged all the obligations of their assignor under the contract. The city, with full knowledge of these facts, and after repeated recognition of the right of the assignees to receive the moneys arising from the contract, paid a portion of them to the contractor, and attempted to justify the payment on the ground that the assignment was invalid. In this contention it was defeated. There was no question of set-off involved in the suit, and no demand for more than the contractor could recover, if the assignment had not been made. It is not decisive of or analogous to our case.

Ramsey's Appeal, 2 Watts, 228, 27 Am. Dec. 301, is not an authority against the claim of the city to set off in this action its judgment against Clement. In that case the Agricultural Bank had a judgment against Ramsey, one half of which it assigned to the Bank of the United States. After this assignment, Ramsey obtained judgments against the Agricultural Bank equal to that it had held against him. It was ruled that he could not set off his judgments against the moiety of the judgment assigned to the Bank of the United States, as its equity was equal, and prior in point of time, to his. Mr. Justice Kennedy, in his opinion in *Filbert v. Hawk*, 8 Watts, 443, referred to *Ramsey's Appeal*, 2 Watts, 228, 27 Am. Dec. 301, and said of it: "The case is imperfectly stated, as reported. in not showing that the assignment to the Bank of the United States was prior in point of time to Ramsey's obtaining his judgments against the Agricultural Bank. But it is clear, from the reasoning of the chief justice in delivering the opinion of the court, that the fact was so; for without that, the equity of the Bank of the United States could not have been equal to Ramsey's."

The judgment is affirmed.

SET-OFF, RIGHT OF. — As to what demands are available as offsets, see note to *Gregg v. James*, 12 Am. Dec. 152-157. Compare also note to *Woodruff v. Garner*, 89 Am. Dec. 482-492.

LONG v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

[137 PENNSYLVANIA STATE, 335.]

INSURANCE — WHAT WILL CONSTITUTE CONTRACT. — Where, prior to the expiration of a policy of insurance, the company informs the assured that his insurance will be renewed if he does not give notice to the contrary, and not receiving notice, the company issues a policy under its custom and previous dealing with him to allow thirty days after the policy issues and takes effect in which to pay the premium, and the insured, eight days after the issuance of the policy, requests of the company, and is granted, thirty days' additional time in which to pay the premium, a contract of insurance exists between the company and the insured at the time of a loss occurring two weeks after such request, the company having received the check of the insured for the premium two days subsequently to the loss, and having held it for two weeks without objection.

WITNESSES — PROPER CROSS-EXAMINATION. — An insurance agent who has received the check of the insured for the premium due on a policy, after a loss has occurred, and has held it for two weeks without objection, and without presenting it for payment, and who has testified that there was no agreement between the company and the insured that the latter should have time in which to pay the premium, may be asked, on cross-examination, whether or not, if there had been no loss, he would have insisted upon the payment of the check.

EVIDENCE — OFFER TO PROVE DECLARATIONS OF AGENT — WHAT MUST CONTAIN. — A party offering to prove the declarations of an alleged agent must first show that the agency exists, and state the substance of the declarations, that the court may judge of their relevancy.

ASSUMPSIT on a policy of fire insurance. In addition to the facts stated in the opinion, it may be stated that the agents of the defendant were Mead and Company, the firm being composed of J. H. Mead and C. A. Rorabaugh. The second specification of error arises out of the following questions asked Rorabaugh while a witness under cross-examination at the trial: "Q. Suppose no fire had occurred, would you have insisted upon the payment of that check by Mr. Long? A. Well, if he had accepted the policy, I would." "Q. There would have been no trouble at all if there had been no fire? A. I suppose not." "Q. Was not his check as good as the money? A. We considered the check good." The offer of evidence out of which arose the third specification of error

was as follows: The defendant proposed to ask the witness W. J. Owens, who was postmaster at Olanta, "if A. A. Long, or J. Roll Bloom, his son-in-law and clerk, procured any United States government-stamped envelopes or envelope at said post-office on Sunday, November 27, 1887, and did also procure the Olanta post-office stamp bearing date November 26, 1887, to be placed on any envelope or envelopes, and if so, under what circumstances, and what became of the same, and if the witness can identify the envelope in evidence which C. A. Rorabaugh testified he received from J. Roll Bloom, addressed to said Rorabaugh, and written to Rorabaugh by A. A. Long, and containing the check for forty dollars, to the order of C. A. Rorabaugh, which check is in evidence; and further to ask the witness what time the mails left Olanta post-office. This, for the purpose of proving that the post-office stamp was fraudulently procured to be put on the envelope in question; that the date said envelope bore was fraudulently made to appear as having been mailed at Olanta November 26, 1887; that it was not mailed at said post-office, and did not pass through the mail, but was carried to Rorabaugh by J. Roll Bloom, at the instance of A. A. Long, the plaintiff; and for the further purpose of showing that said letter and envelope, with false dates thereon, were thus procured, written, and sent for the purpose of making it appear the premium on the policy of insurance in question had been paid before the fire occurred." This offer was objected to, and the objection overruled, so far as to permit the witness to testify to the actual facts done, but not to any declarations made by Bloom in the absence of Long. The other facts appear in the opinion. Judgment for plaintiff upon the verdict, and defendant appeals.

Frank Fielding, for the appellant.

Thomas H. Murray, R. D. Swoope, and Cyrus Gordon, for the appellee.

McCOLLUM, J. The vital question in this case is, whether the evidence was sufficient to justify the jury in finding a contract of insurance. In passing on this question, the previous dealings and relations of the parties, as well as their acts and declarations bearing directly on the pending dispute, must be taken into consideration. In other words, the latter must be construed in the light of the former.

Long was engaged in the mercantile business at Olanta, and

held a policy of insurance issued by the appellant company on his stock of goods, for two thousand dollars. This policy expired on the 1st of November, 1887, and, prior to that time, the company, through its agents at Curwensville, informed him by letter that the insurance would be renewed if he did not give notice to the contrary. As he did not give any notice of a desire to terminate the insurance, the policy in suit was issued by the company and forwarded to its agents, who charged the premium to him, and in their account with the company charged themselves with it. Whether these charges were made before their interview with him on the 8th of November, the testimony does not inform us; but we learn from it that their custom was to carry policies thirty days or more, if requested by the assured, in which case he became their debtor for the amount of the premium, and the company accepted them as its debtor for it. In their former transactions with Long, he was allowed thirty days in which to pay the premium, and his policy remained with them; but it was mutually understood that it was in force for the term described therein, as effectually as if he had paid the premium upon it and taken it away. It was on this understanding that the credit was sought and granted, and that the premium was subsequently paid and received. In view of their custom, and previous dealings with the appellee, their possession of the policy in suit and the non-payment of the premium thereon were consistent with a contract of insurance and his claim that he was their debtor for the premium and they were keeping the policy for him.

When he called at their office on the 8th of November, he did not allege that the renewal of his insurance was not authorized by him, nor refuse to pay the premium for it; but he inquired if he could have thirty days to remit for it, and was assured that he could have until the 10th of December. They admit that but for the fire they would have accepted the premium from him at any time on or before that day. The fire occurred on the 26th of November, and on the 28th they received his check for the premium, and held it until the 12th of December, without intimating to him that it was not satisfactory. Upon their books this premium was charged to him under date of November 1st, and credited under date of December 9th, and in their account with the company a corresponding charge and credit appear. These credits were

entered after the fire and by the direction of Special Agent Piper, who was charged with the duty of investigating the claim in dispute.

The foregoing facts are conceded or appear in the uncontradicted evidence, and assist materially in interpreting and reconciling the conflicting testimony. We are satisfied, upon a careful examination and study of all the evidence, that it was the duty of the court to submit to the jury the question whether a contract of insurance existed between the contracting parties. The authority of the agents to waive the condition in the policy respecting the payment of the premium was conceded in the appellant's sixth point, and is not questioned here. It could not be successfully disputed upon the admitted course of dealing between all the parties concerned: *Lebanon Mut. Ins. Co. v. Hoover*, 113 Pa. St. 591; 57 Am. Rep. 511.

The ruling complained of in the second specification was upon a question in the cross-examination of appellant's agent and witness, who had testified that there was no agreement of insurance, and who had received, after the fire, and without objection, the appellee's check for the premium, and held it two weeks without presenting it for payment. The question was designed to test the accuracy of his previous statement, and his intelligence and integrity touching the matters under investigation, and we are not prepared to say that it exceeded the limits of a proper cross-examination.

There is no error in the ruling on the offer of evidence contained in the third specification. It did not appear, and the offer did not propose to show, that Bloom was acting for Long or by his authority in obtaining the stamped envelopes. But if he had been so acting, and the appellant desired to prove his declarations, the offer should have embraced at least the substance of them, that the court might judge of their relevancy and materiality: *Williams v. Williams*, 84 Pa. St. 812.

The remaining specifications do not require separate consideration. The answers to the appellant's points in relation to the delivery of the policy, the antedating of the check, and the explanation of the book entries, were fair, full, and correct, and, as it is admitted that there was a tender of the premium on the 10th of December, it is profitless to inquire whether the receipt and retention of the check were the equivalent of it.

The judgment is affirmed.

CONTRACT OF INSURANCE, WHAT CONSTITUTES. — Neither the payment of the premium nor the acceptance of the policy is essential to a contract of insurance: *Blanchard v. Waite*, 28 Me. 51; 48 Am. Dec. 474. Where a written application for insurance is made to and filed with the agent of an insurance company, who orally agrees to insure from the date of the application, provided the company is not already upon the risk, there is a complete and valid contract binding upon the company from the date of the conversation, even though the premium be not paid, if a usage of the business to extend the time of paying premiums over to the company by the broker until the end of the month is shown: *Ruggles v. American Ins. Co.*, 114 N. Y. 415; 11 Am. St. Rep. 674. Compare *Putnam v. Home Ins. Co.*, 123 Mass. 324; 25 Am. Rep. 93; *Angell v. Hartford F. I. Co.*, 59 N. Y. 171; 17 Am. Rep. 322; *Fisk v. Cottenet*, 44 N. Y. 538; 4 Am. Rep. 715. Where the agent orally agreed to insure certain property for a stipulated amount for six months from a given date for an agreed premium, but said that his company might not be willing to take the risk after he reported it, and he did not write out the policy, nor report the risk to the company, it was a valid contract of insurance, notwithstanding the fact that the premium was not paid: *Campbell v. American F. Ins. Co.*, 73 Wis. 100. To establish an executory contract of insurance, it must appear that a contract to insure has been entered into, and everything essential to complete the contract has been done: *Johnson v. Connecticut F. Ins. Co.*, 84 Ky. 470. Oral contracts for insurance may be valid and enforceable: *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362; 31 Am. Rep. 732; note to *Lebanon Mut. Ins. Co. v. Hoover*, 57 Am. Rep. 514, 515; *Northwestern I. Co. v. Etina Ins. Co.*, 23 Wis. 160; 99 Am. Dec. 145.

DRAKE v. PENNSYLVANIA RAILROAD COMPANY.

[187 PENNSYLVANIA STATE, 352.]

CONTRIBUTORY NEGLIGENCE BY RAILROAD PASSENGER. — Knowledge by a railroad passenger that no platform is provided for passengers to enter or leave trains on the north side of the track, while such a platform is provided on the south side of it, is notice of a rule of the company that he should get on and off on the south side; and if, voluntarily disregarding this rule, he alights on the north side, in the night-time, and is thereby injured by falling into an unguarded ditch dug by the company, he is guilty of negligence, and cannot recover damages.

CONTRIBUTORY NEGLIGENCE — RAILWAY PASSENGER. — A passenger impliedly assents to all reasonable rules and regulations of the railway company, and if injury results to him from his voluntary disregard thereof, he cannot recover damages from the company.

CONTRIBUTORY NEGLIGENCE — RAILWAY PASSENGER. — EVIDENCE of occasional instances of passengers alighting on the side of the train where there was no platform, without the knowledge or consent of the company, is inadmissible to affect its liability for injury to a passenger alighting there, with notice that passengers were prohibited from so alighting, and that there was a platform on the other side.

CONTRIBUTORY NEGLIGENCE — RAILWAY PASSENGER — WAIVER OF REGULATION. — Proof of permission by a railway company, to persons residing north of its road, to cross its right of way and track, in going and

returning in different parts of a town, does not show a waiver of its regulations affecting its passengers with notice to alight on the south side, nor permission to them to alight on the north side.

William A. Galbraith and Davenport Galbraith, for the appellant.

J. Ross Thompson, for the appellee.

McCOLLUM, J. The appellant was a passenger on the defendant company's train on a dark night in December, 1887, and in alighting from it at Union station, stepped into a deep ditch by the side of the road-bed, and was injured. A portion of this ditch was dug by the company that day, for purposes appurtenant to its road, and there were no lights or guards near it. It was on the north side of the track, and the depot was on the south side of it. The appellant was, and for twelve years previous thereto had been, a resident of Union, and his house was near the depot. He was well acquainted with the locality; he knew there was no platform or place provided by the company for its passengers to alight on the north side of the track, and that it had constructed a safe and convenient platform in connection with its depot on the south side of it, for their use in entering and leaving its trains. This knowledge was notice to him of a rule of the company that they should get on and off there. In violation of this rule, which it was his duty to conform to, he refused the safe means of exit, and stepped into the ditch on the other side, and for the consequences of his leap in the dark seeks to hold the company responsible.

A passenger's consent to a reasonable regulation of the company for entering and leaving its trains is implied, and for an injury which results from his voluntary disregard of it the company is not liable: *Sullivan v. Philadelphia etc. R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 689. In the present case, it affirmatively and sufficiently appears in the testimony produced by the appellant that the company had provided safe and convenient means of ingress and egress to and from its trains, and in this particular had discharged its whole duty to its passengers. It was under no obligation to them to provide a convenient place to alight on the north side, nor to keep its right of way there free of obstructions for the benefit of pedestrians. It was not bound to anticipate and guard against the consequences of a violation by its passengers of its reasonable and known regulations for their protection. It

is admitted by the appellant that his observance of these regulations would have insured his safe exit from the train, and it is obvious that the injury he received was the direct consequence of his disregard of them. It was his neglect of a duty he owed to the company, and not its neglect of a duty it owed to him, which caused the injury, and is a sufficient answer to his demand that the company shall compensate him for it. This is the rule distinctly laid down in *Sullivan v. Philadelphia etc. R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 689; and enforced in *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; 37 Pa. St. 420.

In this case, there was nothing to justify or excuse the appellant's deliberate disregard of the rules of the company. It was prompted by a desire to shorten the walk from the train to his destination. A moment's time and a few rods in distance were all that he could save by it, and neither was of unusual importance to him. It was claimed and proved that the company had permitted persons residing north of its road to cross its right of way and track on foot, at different points in the vicinity of the depot, in going to and returning from their work or business in other parts of the town. But in this there was no waiver of its regulations affecting its passengers, nor permission to them to alight on the north side. There was a little evidence to the effect that occasionally a passenger got off there, but none that the company consented to or knew of it, and the learned judge correctly ruled that the rights and duties of the appellant were not affected by it. In *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318, 37 Pa. St. 420, it was held that the admission of such evidence was error. This case is clearly within the principle of the authorities cited, and the judgment is affirmed.

RAILWAY COMPANIES—CARRIERS OF PASSENGERS—RULES AND REGULATIONS.—Railway companies as carriers of passengers may adopt rules and regulations which will be binding upon passengers, provided such rules and regulations are reasonable: *Peole v. Northern P. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289, and note; *Reese v. Pennsylvania R. R. Co.*, 131 Pa. St. 422; 17 Am. St. Rep. 818, and note; *McGowan v. Morgan's etc. S. S. Co.*, 41 La. Ann. 732; 17 Am. St. Rep. 418, and note. And the company is not liable for injuries to passengers who disobey such regulations: *Dodge v. Boston etc. S. S. Co.*, 148 Mass. 207; 12 Am. St. Rep. 541. As to who must decide upon the reasonableness of a rule made by a carrier, see *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517.

RAILWAY COMPANIES—DEFECTIVE PLATFORMS.—Although a passenger may have known of the defective condition of a platform, he is not bound to

keep such knowledge actually in mind: *Pennsylvania Co. v. Marion*, 123 Ind. 416; 18 Am. St. Rep. 330. If there are two ways of egress, one of which is faulty, but which has been assented to by the company as a means of exit from its trains, an unwarned passenger using it, and receiving injuries, is entitled to recover, even though the other way, which might have been used, was safe: *Delaware etc. R. R. Co. v. Troutwein*, 52 N. J. L. 169; 19 Am. St. Rep. 442.

OGLE v. BAKER.

[187 PENNSYLVANIA STATE, 373.]

JUDGMENTS, WHEN MAY BE COLLATERALLY ATTACKED. — A judgment or decree obtained by fraud and collusion of the parties to it, for the purpose of defrauding a third person, may be attacked by him in a collateral proceeding.

JUDGMENTS, WHEN CANNOT BE COLLATERALLY ATTACKED. — A party who alleges that a judgment has been obtained against him by fraud may attack it directly, by appeal from or by motion to open it, but cannot attack it collaterally in an action to recover money collected by regular process issued upon it.

JUDGMENT ON WARRANT OF ATTORNEY, WHEN CANNOT BE COLLATERALLY ATTACKED. — A judgment entered on a warrant of attorney is as impervious to collateral attack in an action to recover money collected by regular process issued upon it as is a judgment obtained in open court.

R. P. Kennedy and Edward Campbell, for the appellant.

A. D. Boyd, R. E. Umbel, G. D. Howell, and E. H. Reppert, for the appellee.

McCOLLUM, J. On December 22, 1886, a judgment was entered in the court of common pleas of Fayette County, in favor of the appellant and against the appellee, for five hundred dollars, with interest thereon from the 16th of March preceding. This judgment was entered upon and by virtue of a warrant of attorney contained in a note purporting to be executed by the appellee. An attachment execution was issued upon it, which was duly served upon the defendant therein, and the National Bank of Fayette County was summoned as garnishee. In due course of law, judgment was obtained against the garnishee for \$377, and an execution was issued for its collection. The bank paid the amount thereof to the sheriff, who paid it to the appellant. In April, 1887, this suit was brought by the appellee to recover the amount so paid, and the substance of her claim is, that the note on which the original judgment was entered was a forgery, and that she did not appear in answer to the attachment because the appellant told her that she need not, and that he

would attend to it for her. The judgment, and the attachment proceedings founded upon it, remain of record, unimpeached, and the question is, whether, while they so remain, an action for the recovery of the money collected and paid by virtue of them can be maintained.

The general rule is, that money collected or paid upon execution cannot be recovered back unless the judgment on which the writ issued is first vacated or reversed: *Federal Ins. Co. v. Robinson*, 82 Pa. St. 357; *Travelers Ins. Co. v. Heath*, 95 Pa. St. 333. The reason of the rule is well stated by Mr. Justice Sharswood in *Federal Ins. Co. v. Robinson*, 82 Pa. St. 357, as follows: "An execution is the end of the law. To permit money so collected or paid to be reclaimed in a new suit would lead to indefinite and endless litigation. If such suit could be maintained, then another might be brought to recover the money paid on the judgment and execution in it, and so on *ad infinitum*."

In *Tarbox v. Hays*, 6 Watts, 398, 31 Am. Dec. 478, the plaintiffs brought an action of replevin to recover certain property which the defendant had purchased at a constable's sale on an execution issued on a judgment which he held against them. It was alleged by the plaintiffs that the judgment was procured by fraud and without notice to them, but it was ruled by this court that the defendants therein could not question it collaterally. A judgment or decree procured through the fraud and collusion of the parties to it, for the purpose of defrauding a third person, may be attacked by such person in a collateral proceeding, because he has no standing to appeal from it, or to require that it be vacated or reversed. A party, however, who alleges that a judgment has been obtained against him by fraud may assail it directly by appeal from or motion to open it, but he cannot impeach it in an action to recover the money collected by regular process issued upon it. If it be conceded that the averments of the appellee are true, her appropriate remedy was an application to open the judgment. The record of the attachment proceeding shows that she had notice of the judgment before anything was recovered upon it, and the accuracy of this record is not disputed by her. A judgment entered on a warrant of attorney is as impervious to collateral assault as a judgment obtained in open court.

As to the truth or falsity of the appellee's claim, or of the evidence submitted to support or to controvert it, we express

no opinion. We merely decide that while the judgments in question remain of record unreversed, an action to recover the money collected upon them cannot be maintained.

The judgment is reversed.

JUDGMENTS—COLLATERAL ATTACK.—A judgment of a court of competent jurisdiction cannot be collaterally impeached, unless the record shows affirmatively a want of jurisdiction; and evidence even of fraud not found in the judgment roll will not be received to avoid a judgment, although such fraud was in obtaining jurisdiction: *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752, and note collecting cases upon the subject of collateral attacks upon judgment. Compare *Wilberon v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 808; *Long Syne Gold-mining Co. v. Ross*, 20 Nev. 127; 19 Am. St. Rep. 337.

PAXSON v. NIELDS.

[1ST PENNSYLVANIA STATE, 885.]

NEGOTIABLE INSTRUMENTS—PROMISE TO PAY PRE-EXISTING DEBT OF ANOTHER, WITHOUT NEW CONSIDERATION, VOID.—A note given by a widow for the payment of a debt due by her husband, who was insolvent at the time of his death, without any new consideration to support it, is void, and the renewal of the note from time to time will not raise such consideration.

Lewis Dewart and J. Nevin Hill, for the appellants.

W. H. M. Oram, for the appellee.

MCCOLLUM, J. We are unable to discover from the evidence any consideration for the note in suit. The maker of it is the widow and executrix of Theodore F. Nields, who, at his death, was indebted to the appellants on two notes and a book-account, in the sum of \$307.52. The estate was insolvent, and, after discharging the judgment liens, was able to pay its general creditors but five per cent on their claims. On April 21, 1885, the appellants presented their claim to the auditor appointed to distribute the fund in the hands of the executrix, and seven days thereafter induced her to give her personal note for it, which, when paid, was to be in full of their demand against the estate. The dividend their claim was entitled to was \$16.47, and it was awarded to them. They received it, and applied it on her note. This note was renewed from time to time, and the amount thereof was reduced by payments from her own earnings to \$267.94 at the date of the last renewal. The fund shown by the account of the executrix to be in her hands for distribution was all there

was for the creditors, and there was no expectation by the payees or maker that the estate would pay a farthing beyond the dividend this fund would yield. The appellants' demand, after the application of this dividend to it, was worthless, and the parties knew it. It was because of this knowledge that the payees thought it was so generous and honorable in the maker to assume the debt of her dead husband.

It is clear that the appellants lost and the appellee acquired nothing by this transaction. It was a one-sided affair, and exclusively for the benefit of the former. But as a promise to pay the pre-existing debt of another person to his creditor requires a new consideration to support it, they can take nothing further by it. What they have received by virtue of it, they may retain, but the law will not help them to more. The cases cited to sustain the contention of the appellants differ essentially from this. In *Leonard v. Duffin*, 94 Pa. St. 218, the note was under seal, and the time for the payment of a debt then due was extended one year. In *Bentley v. Lamb*, 112 Pa. St. 480, 56 Am. Rep. 330, the due-bill was given in execution of an agreement to pay additional compensation for services rendered, and in view of the facts recited in the agreement, this court declined to infer that the services had been previously compensated in full. In *Reily v. Dean*, 36 Leg. Int. 304, the maker of the note volunteered to give it, to avoid protest, and to extend the time of payment of a note against the estate.

As it sufficiently appears in the testimony of the appellants that in this case there was no consideration for the promise sued upon, there was no question for the jury, and the learned judge was right in directing a verdict for the defendant.

The judgment is affirmed.

CONSIDERATION, EFFECT OF WANT OF. — A note not founded upon a consideration is void: *Dickinson v. Hall*, 14 Pick. 217; 25 Am. Dec. 390, and note 392, 393. A guaranty is also void for want of a valid consideration to support it: *Evansville N. Bank v. Kaufman*, 93 N. Y. 273; 45 Am. Rep. 204. No promise to pay can be enforced unless founded upon a consideration: *Utica etc. R. R. Co. v. Brinkerhoff*, 21 Wend. 129; 34 Am. Dec. 220, and note. There must be a consideration to support every promise to pay the debt of another: *Stewart v. Jerome*, 71 Mich. 201; 15 Am. St. Rep. 252. Gratuitous promises cannot be enforced by suit, however worthy the objects intended to be promoted: *Presbyterian Church v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767; *Mills County N. Bank v. Parry*, 72 Iowa, 15; 2 Am. St. Rep. 228, and note.

OYSTER v. KNULL.

[187 PENNSYLVANIA STATE, 448.]

WILLS — WORDS CREATING ONLY LIFE ESTATE. — A devise to a son, of a farm "for his support, and if he should be spared to have family, I desire the above estate to go to the use of his children," creates only a life estate in the devisee. The word "children," as used, clearly indicates an intention by the testator to use it as a word of purchase, and not of limitation.

WILLS — WORD "CHILDREN," IN WILL, IS GENERALLY WORD OF PURCHASE, and not of limitation; and while it may be used to signify heirs, or heirs of the body, it will not be so construed, unless the testator has employed other words indicative of an intention to use it as a word of limitation.

WILLS — WORDS CREATING ONLY LIFE ESTATE. — In a devise to a son, of a farm "for his support, and if he should be spared to have family, I desire the above estate to go to the use of his children," the words "for his support" indicate that a life estate is intended; and the words "I desire," as thus employed, are not merely precatory, but are as mandatory as if the words "I will and direct" had been used.

H. M. Graydon, for the appellant.

B. F. Etter, for the appellee.

STERRETT, J. The only question presented in this case stated is, whether the plaintiff, under his father's will, took a freehold of inheritance or only a life estate in the Mount Airy farm.

It appears that in June, 1865, the testator, Simon Oyster, made his will, and in less than two years thereafter died seised of certain real estate, leaving to survive him a widow, Margaretta Oyster, and five children, one of whom, the plaintiff, then about ten years old, has ever since remained unmarried and without children. The operative clause of his will is as follows: —

"4. I give and bequeath to my son, Napoleon Kiever Oyster, my Mount Airy farm, containing 125 acres of land, with all the improvements thereon, in Susquehanna township, adjoining the city Harrisburg, with a three-story brick house, No. 3 in South Street and lot thereon, for his support, and if he should be spared to have family, I desire the above estate to go to use of his children, and ten shares of Harrisburg Bridge stock and twenty shares of my Harrisburg Bank for his use."

The learned president of the common pleas came to the conclusion that the testator's general intention was to give the plaintiff an estate in fee, and he accordingly entered judgment on the case, stated in his favor. In so doing we think there was error. It cannot be seriously doubted that the word

"children," in the clause above quoted, was used by the testator as a word of purchase, and not of limitation. That word in a will is primarily and generally a word of purchase; and while it may be used to signify "heirs," or "heirs of the body," it will not be so construed, unless the testator has employed other words indicative of an intention to use it as a word of limitation. There appears to be nothing in the will to indicate any such intention. The testator, it is true, used the words "heirs" and "children" interchangeably, but in doing so he evidently in each case meant "children." Nor can anything be predicated of the facts that plaintiff was only ten years of age when his father died, and has since remained unmarried and childless: *Cote v. Von Bonnhorst*, 41 Pa. St. 243.

The testator gave his Mount Airy farm, etc., to plaintiff "for his support," thereby indicating that a life estate was intended; and then declares: "If he should be spared to have family, I desire the above estate to go to use of his children." The word "desire," thus employed by the testator, is not merely precatory. It is as mandatory as if the words "I will," or "I order and direct," had been used: *Fox's Appeal*, 99 Pa. St. 382. Under another clause in the same will, the question heretofore arose whether the devise therein took an estate in fee or for life only. In an opinion by the present chief justice, this court held that the devise to the first taker was for life only: *Oyster v. Oyster*, 100 Pa. St. 538; 45 Am. Rep. 388. The phraseology of that clause differs from that of the one now under consideration, but while that is so, and the language of the former is stronger than that of the latter, the difference appears to be in phraseology, rather than in meaning.

As already stated, the words "I desire," etc., as employed by the testator, are equivalent to the words "I will and direct." The clause in question may then be read thus: "I will that the above estate shall go to the use of his children." Coupling that with the preceding words of same clause, "for his support," the interest of plaintiff as first taker would appear to be limited to a life estate. While it cannot be said that the construction we have adopted is entirely free from doubt, we are of opinion that judgment on the case stated should be entered in favor of defendant.

Judgment reversed, and judgment on the case stated is now entered in favor of the defendant.

WILLS — CONSTRUCTION OF THE WORD "CHILDREN," AS USED IN A WILL. — As to when the word "children," or a word of such character, as used in a will, must be construed as a word of purchase, and when as a word of limitation, see *Hughes v. Nibbel*, 70 Md. 434; 14 Am. St. Rep. 377, and notes; *Boydin v. Anacrum*, 28 S. C. 466; 13 Am. St. Rep. 606, and notes; *Whitridge v. Williams*, 71 Md. 106; 17 Am. St. Rep. 513; *Long v. Paul*, 127 Pa. St. 456; 14 Am. St. Rep. 862, and notes; *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and note 99-107.

RICHARDS v. BUFFALO, NEW YORK, AND PHILADELPHIA RAILROAD COMPANY.

[187 PENNSYLVANIA STATE, 564.]

RAILROADS — RIGHT OF WAY — EJECTMENT BY REAL OWNER. — Where a railroad company relies only upon a grant of a right of way from an alleged owner in entering upon land to construct its road, the subsequent grantee of the real owner may maintain ejectment against the company; and upon the recovery of judgment, execution should be stayed a sufficient time to permit the company to obtain the right of way under its power of eminent domain.

ESTOPPEL — RAILROADS — RIGHT OF WAY — EJECTMENT BY REAL OWNER. — Where a railroad company, at the time of procuring a grant of a right of way from an alleged owner, had knowledge that another was the true owner of the land, the latter may subsequently assert title and maintain ejectment against the company; nor is he estopped by the fact that he was present when the grant was made, and encouraged its execution by his words or his silence, and afterwards permitted the company to construct and operate its road for eleven years without objection.

S. R. Mason and James D. Hancock, for the appellant.

Q. A. Gordon, S. A. Miller, S. Griffith, and S. B. Griffith, for the appellees.

STERRETT, J. It was admitted that on and prior to February 2, 1866, Samuel Pew owned in fee a tract of land including the strip in controversy, and that under him, as a common source of title, both parties to this action of ejectment respectively claim and defend. The evidence shows that on that day Samuel Pew, by articles of agreement, transferred a part of said tract to his sons, Joseph V. and A. Preston Pew; that by sundry meane conveyances a portion of said last-mentioned tract, including the land in controversy, became vested in Elizabeth Cousins, October 3, 1870; and that she was in possession thereof from that time until May 12, 1884, when she conveyed the same in fee to Anna R. Cousins, now Anna R. Richards, the beneficial plaintiff below. That evi-

dence made a clear *prima facie* case in her favor, and entitled plaintiffs below to a verdict.

The railroad company, defendant, then gave in evidence a grant of right of way over the land in controversy to the New Castle and Franklin Railroad Company, its predecessor, executed by Samuel Pew, March 26, 1874, and also introduced testimony to prove what occurred at and about the time the right of way was granted. The character of that evidence is sufficiently indicated by the points for charge submitted by defendant below. Its purpose was to show that Elizabeth Cousins, from whom the beneficial plaintiff directly derived title, was estopped by her action at and about the time the right of way was executed by Samuel Pew, and that the beneficial plaintiff took title with knowledge of the facts constituting the alleged estoppel.

It clearly appears that the New Castle and Franklin Railroad Company, predecessor of defendant company, entered upon the land in controversy and constructed its road under and in pursuance of the grant aforesaid. There was no evidence tending to show that the land was appropriated for railroad purposes by either company by virtue of its charter powers, or otherwise than under the grant of right of way. In other words, unless defendant company had a right of possession under the alleged grant in connection with facts sufficient to constitute an estoppel, plaintiffs below were entitled to recover.

The court was requested to instruct the jury as follows:—

“1. That the plaintiffs’ testimony having shown that Elizabeth Cousins was the owner of the land on which defendant’s road was constructed at the time the same was appropriated by them for the purposes of their road, and for ten or eleven years thereafter, there can be no recovery in this case, for the reason that, as shown by the evidence, the defendant company entered upon the land in controversy and constructed its road without opposition from the owner; and this being an appropriation of the land, the right of action, if any existed, was in Elizabeth Cousins, and not in the plaintiffs.

“2. If the jury find from the evidence in the case that Elizabeth Cousins was the owner of the land in controversy at the time the same was appropriated by defendant company; that she was present when her father, Samuel Pew, settled the right of way with W. E. Loy, the agent of the company, and either authorized him to make said settlement, or afterwards,

by her silence, permitted or encouraged the defendant to make valuable improvements upon the land, — then she and those claiming under her are now estopped from setting up title, and there can be no recovery in this case.

“3. That, under the law and the evidence in this case, the plaintiffs cannot recover.”

The refusal of the court to affirm the first and third points, and the qualified affirmance of the second, constitute the first three specifications of error.

The first point was rightly refused, for the reason suggested in the learned judge's answer thereto. As has already been remarked, there is no evidence that the land in question was appropriated for railroad purposes otherwise than under and in pursuance of the grant above referred to. That, in connection with the alleged estoppel, was the only ground of defense the company had. Failing in that, it follows that the company was wrongfully in possession, and the principle of *McClinton v. Pittsburg etc. R'y Co.*, 66 Pa. St. 404, and that line of case, applies. As to the third point, it would have been error to have affirmed it, because the evidence necessarily carried the case to the jury on questions of fact relied on by the company, and especially the facts constituting the alleged estoppel.

Instead of simply refusing or affirming the second point, without more, the learned judge answered it thus: “If you find from the evidence that at the time the defendant and Samuel Pew made the contract shown by the instrument dated March 26, 1874, Elizabeth Cousins was present, and was aware that the railroad company, through its agent, Mr. Loy, was about to take the grant of a right of way . . . over the land in suit, and encouraged the making of this contract, either by her words or by her silence; that she thereafter permitted the railroad company to pay the consideration mentioned in the writing, and construct its road on said land, without disclosing to the railroad company the true state of the title, — then she and her successors in title would be estopped from setting up her title as against defendant's right of way, and the plaintiffs could not recover, unless you find that the agent of the railroad company had knowledge, at the time, of the title of Elizabeth Cousins. If you find that the agent of the company knew, at the time he took the grant from Samuel Pew, that Elizabeth Cousins was the owner of a part of the land embraced in the grant, and that the part in controversy here, there would be no estoppel. In other words, if the railroad

company knew the truth at the time they took the grant, the plaintiffs would not be estopped from showing the truth now. Thus explained, the request is affirmed."

With the single exception of the explanation or qualification contained therein, the answer above quoted is substantially in the language of the point. The qualification complained of was not erroneous. If the railroad company, through its agent, Mr. Loy, knew Mrs. Cousins owned the land in controversy, it should have procured a right of way executed by her in person, or by her duly constituted attorney in fact. Instead of doing so, it was guilty of the folly of accepting a grant from one who was neither owner of the land, nor the duly constituted attorney in fact of the owner. If the company actually knew the fact that Mrs. Cousins owned the land, how could it be deceived or misled by her alleged acts and declarations indicating the contrary? And on what principle can she or her vendee be estopped from asserting and proving the truth of that fact? If vitality can be thus infused into an unauthorized grant, it would be a very convenient way of circumventing the statute of frauds and perjuries. We think the learned judge was right in saying, "If the railroad company knew the truth at the time they took the grant, the plaintiffs would not be estopped from showing the truth now."

The last specification, reciting extracts from the general charge, presents, substantially, the same question of estoppel. The learned counsel for appellant, referring to the general charge on that subject, says: "We would not complain of these instructions, if there had been any evidence to warrant the submission to the jury." The evidence that the company's representative knew, at the time he procured the grant from Samuel Pew, that Mrs. Cousins owned the land in controversy, may be slight, but it was proper for the jury. In appellant's history of the case, it is substantially conceded that, as the owner of the land she had purchased four years before, Mrs. Cousins was then in possession thereof. That of itself was at least constructive notice of her title. One of the witnesses also testified, in substance, that while Mrs. Cousins was participating in the negotiations at the time of the grant, Mr. Loy knew or understood that she owned the land, and in the presence of the witness asked her if she was willing to have Samuel Pew settle the matter for her. The testimony, it is true, was conflicting, but it was all proper for the consideration of the jury.

There is nothing in the record that would warrant a reversal of the judgment; but, while that is so, it would be inequitable, in view of all the circumstances, to permit it to be enforced without giving the appellant an opportunity of condemning the land, and acquiring the right of way in the manner prescribed by the act of assembly in such case made and provided. This can be done by ordering a stay of execution for sufficient length of time to enable the company to appropriate the land according to law.

Judgment affirmed; and it is ordered that upon payment of costs the execution be stayed for four months; and in the mean time the company, defendant below, may proceed to condemn the land, and acquire the right of way according to law.

COMPARE THE CASE OF *Keil v. Chartiers V. G. Co.*, 131 Pa. St. 466, 17 Am. St. Rep. 823, where it is decided that the owner is entitled to maintain an action of trespass against a corporation which has entered upon his land without payment of damages or offering security for the same. But in *Oliver v. Pittsburgh etc. R. R. Co.*, 131 Pa. St. 408, 17 Am. St. Rep. 814, plaintiff was denied the right to maintain an action of trespass against a railway company, under similar circumstances, inasmuch as he had consented to the entry upon his land, and acquiesced in the expenditure of much money in the construction of the railroad thereover. Yet one is not estopped from claiming compensation for damages resulting to him by reason of the construction of a railroad over his lands because he did not object to such construction; and he may even bring an action of ejectment, where he has not been compensated for his damages: Note to *Oliver v. Pittsburgh etc. R. R. Co.*, 17 Am. St. Rep. 817.

ESTATE OF KEYS.

[137 PENNSYLVANIA STATE, 565.]

EQUITABLE ASSIGNMENT WITH VESTED INTEREST, WHAT CONSTITUTES. — A power of attorney executed by a tenant in common of land in process of partition, authorizing his sister to take possession of, lease, or sell and convey his interest in the land, accompanied by a letter authorizing her to collect the proceeds of the sale of his interest in the land, and to appropriate so much thereof as might be necessary to pay a debt of \$250 borrowed from her, operates as an equitable assignment of a vested interest in so much of the brother's estate as is necessary to pay the indebtedness named in the letter, and such interest is not divested by the subsequent death of the brother.

THE power of attorney referred to in the opinion provided as follows: "Know all men by these presents, that I, Daniel Keys, of the county of Calaveras, and state of California, have made, constituted, and appointed, and by these presents do

make, constitute, and appoint, Marinda Spriggs, of the state of Pennsylvania, my true and lawful attorney, in my name, place, and stead to enter into and take possession of all real estate that I now own or may hereafter acquire in the state of Pennsylvania, and to lease the same for such price as she may deem best, and collect the rent, and also to sell and convey my said real estate, or any part thereof, for such price and upon such terms and credits as she may deem expedient," etc.

A. A. Purman and H. J. Ross, for the appellant.

R. F. Downey, for the appellee.

STERRETT, J. In her petition to the court of common pleas, appellant refers to the proceedings in partition at No. 1 of October term, 1884, wherein the real estate of her brother, John Keys, deceased, was sold, etc., and then, in substance, avers that \$513.77, the last installment of purchase-money, has been paid into court; that her brother, Daniel Keys, one of the eight heirs of said deceased, executed a power of attorney, coupled with an interest in her favor, authorizing her to collect his share of the estate, and at the same time, by a writing, assigned and appropriated his interest in the estate, or so much thereof as was necessary, to pay a debt of \$250, which he owed her for borrowed money, etc., and asking leave to take out of court one eighth of the fund, to which, as one of the heirs of her brother, she was entitled, and also one eighth of the same, claimed by her under and by virtue of said power of attorney and assignment. Leave was therefore granted to appellant and six other heirs to take out of court their respective shares of the money paid in as aforesaid; but, as to the remaining share, a citation was directed to Henry Keys, administrator of Daniel Keys, then deceased, to show cause why the share of his intestate should not be paid to appellant, as prayed for in her petition.

In his answer, the administrator denied the right of appellant, by virtue of the alleged power of attorney, assignment, or otherwise, to take out of court the whole or any part of his intestate's share of the fund, and claimed that he alone, as his personal representative, was entitled to receive said share. The court held that the "power of attorney was not coupled with an interest so as to entitle" appellant "to the fund in controversy," and accordingly dismissed her petition as to that branch of her claim. The sole question presented by the

assignments of error is, whether, in so deciding, the court did not err.

There is nothing in the power of attorney from Daniel Keys to appellant to indicate that it was intended to operate as a power coupled with an interest; but his letter of same date, delivered to her with the power of attorney, fully explains the purpose of the latter, and should be considered in connection therewith. That letter, dated December 5, 1884, is as follows:—

“Dear Sister, — Enclosed you will find power of attorney i want you to collect the money that is coming to me from the land that is now to be sold and keep the two hundred and fifty dollars and interest on it that i borrowed of you if there is anything left you can send it to me and if there is not anuff to pay you the money that i borrowed of you i will send it to you some time in the future. DANIEL KEYS.”

As disclosed by this letter, the manifest purpose of Daniel Keys was to specifically appropriate so much of his share in his brother's estate as was necessary to pay the indebtedness therein mentioned; and to that end he invested his sister with full authority to receive the money that was coming to him from the land that was then about being sold, and credit the same on account of that indebtedness. There is nothing in the evidence to indicate any other intention. The land referred to in that and subsequent letters is undoubtedly the same that was shortly afterwards sold under the proceedings in partition, and the money in court is part of the proceeds of that sale. What, then, was the effect of the power of attorney and accompanying letter, both of which appear to have been delivered to appellant at the same time? Without pausing to inquire what is necessary to constitute a power coupled with an interest, and wherein it differs from a specific appropriation of property, or the proceeds thereof, to the payment of a particular debt, or for any other special purpose, we are of opinion that the power of attorney and letter above quoted operated as an equitable assignment to appellant of so much of Daniel Keys's interest in the estate of his brother John as would be sufficient to pay the indebtedness of \$250, and interest, specified in the letter. To that extent appellant thereby acquired a vested right to the purchase-money raised by the sale in partition, and that right was not divested by the subsequent death of Daniel Keys, in April, 1887.

It appears that his share of the fund paid into court is less than the balance due appellant. If that be so, she is entitled

to the whole of the fund in controversy. It therefore follows that the learned judge erred in refusing to permit her to take it out of court.

Decree reversed, at the costs of the appellee, and record remitted for further proceedings in accordance with this opinion.

EQUITABLE ASSIGNMENT, WHAT IS. — Where one gives to another a power of attorney to collect money and pay his creditors, the transaction constitutes an equitable assignment: *Watson v. Bagaley*, 12 Pa. St. 164; 51 Am. Dec. 595. Anything showing an intention on the one side to make a present irrevocable transfer of a fund, and from which an assent to receive it may be inferred on the other, will operate in equity as an assignment: *Bank of Commerce v. Bogy*, 44 Mo. 13; 100 Am. Dec. 247. Compare note to *Field v. Mayor*, 57 Am. Dec. 440, 441; *Murray v. Buell*, 76 Wis. 687; 20 Am. St. Rep. 92, and note; *Patterson v. Caldwell*, 124 Pa. St. 455; 10 Am. St. Rep. 598. An agreement entered into, whereby an agent, to whom a power of attorney is given to collect a claim, is to indemnify the holder of the claim against all expenses, and is himself to retain the amount collected, amounts to an assignment of such claim: *Best v. Sims*, 73 Wis. 243.

COLLNER v. GREIG.

[187 PENNSYLVANIA STATE, 606.]

PARTNERSHIP — EVIDENCE, WHEN INADMISSIBLE TO SHOW PROPERTY TO BE FIRM ASSETS. — As against purchasers and lien creditors dealing with the owners of land on the faith of a recorded title, and without notice that it is different from what it appears of record, parol evidence is inadmissible to show that although the land was conveyed to the grantees as individuals, yet it was held by them as partnership property.

PARTNERSHIP — LAND, WHEN REGARDED AS FIRM ASSETS. — As between partners, land treated by them as partnership property, especially if purchased and paid for with partnership money, is regarded as firm assets, notwithstanding it was conveyed to the grantees as tenants in common. Whether it is partnership realty is a question of intention, which may be manifested by acts and declarations, and established by parol evidence.

PARTNERSHIP PROPERTY — INTEREST ACQUIRED BY FIRST PURCHASER. — A conveyance by one partner, with the consent of the others, of all his interest in the firm and its assets, to a third party, vests in the purchaser all the retiring partner's interest in the firm assets, including its real estate; and if such retiring partner afterwards conveys his interest in the firm real estate to another, without consideration, the second purchaser acquires no higher right than his grantor had, and no interest which he can enforce in ejectment against the first purchaser.

EJECTMENT by W. F. Collner against G. W. Greig. The land in dispute was purchased with partnership money, and held and used as partnership property by the firm of Richey,

Finkbine, & Co. On February 10, 1873, Finkbine sold and Greig purchased all Finkbine's interest in such partnership, Finkbine knowing that the other members of the firm with Greig were to continue the business as partners, under the firm name of Richey, Smith, & Co., and that the interest so purchased by Greig was to be his contribution to the capital of the new firm. When Finkbine sold to Greig he had no separate and specific interest in the lands in dispute. On January 5, 1885, Finkbine and wife deeded to Collner certain lands described in the deed, including the land in dispute. Judgment for defendants, and plaintiff appealed.

W. L. Corbett and Don C. Corbett, for the appellant.

J. S. Ferguson and B. J. Reid, for the appellees.

Per CURIAM. We are clearly of opinion that the learned judge below was right in holding that the plaintiff had no higher rights than Finkbine, his grantor. The court has found, and we think correctly, that the real estate in controversy was firm property, and as between the members of the firm and those who dealt with them with knowledge of the facts, it was personal estate. As to a portion of it, the deeds were in the name of the firm; as to other portions, the title was in the names of the individual members of the firm. The court below has found, however, that all of it was paid for by the firm, belonged to the firm, and was recognized and treated as firm property. It is settled law that as against purchasers and lien creditors dealing with the owners of land on the faith of a recorded title, and without notice that it is different from what it appears of record, parol evidence is inadmissible to show that although the land was conveyed to the grantees as individuals, yet it was held by them as partnership property; but as between the partners themselves, land treated by them as partnership property, especially if purchased and paid for with partnership money, is to be regarded as partnership assets, notwithstanding it was conveyed to the grantees as tenants in common; its character is largely a question of intention, which may be manifested in acts and declarations, and be established by parol testimony: *Warriner v. Mitchell*, 128 Pa. St. 153, and authorities there cited. The agreement of February 10, 1873, was a sale by Finkbine, one of the partners, to Greig of all the interest of the former in the firm and its assets. Greig was to take Finkbine's place and interest in the firm, and this was assented to

by the other partners. It follows that the sale passed all Finkbine's interest in the assets of the firm, including the real estate. This left nothing in Finkbine to convey to any one else. The plaintiff here was not shown to have been a *bona fide* purchaser. There is no evidence that he paid a dollar on account of his purchase. The court below was therefore correct in ruling, as before remarked, that he occupied no higher position than Finkbine.

Judgment affirmed.

PARTNERSHIP PROPERTY. — As to the effect of conveyances made to a firm using the firm name as the grantee, see *Menage v. Burke*, 43 Minn. 211; 19 Am. St. Rep. 235, and note; *Frost v. Wolf*, 77 Tex. 455; 10 Am. St. Rep. 761. To make land partnership property, it must have been purchased with partnership funds for partnership purposes: *Albre v. Kahle*, 123 Ill. 496; 5 Am. St. Rep. 540. Compare note to *McCormick's Appeal*, 98 Am. Dec. 197-201; *Greenwood v. Marvin*, 111 N. Y. 423. Realty bought in the name of one of the partners for partnership purposes with partnership funds is held by such partner in trust for the firm: *Shaw's Estate*, 81 Me. 207; *Roberts v. Eldred*, 73 Cal. 394; *Pepper v. Thomas*, 85 Ky. 539.

DEEDS — PAROL EVIDENCE. — As to the competency of parol evidence to vary or explain a deed, see *Palmer v. Farrell*, 129 Pa. St. 162; 15 Am. St. Rep. 708, and note; *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562, and note; *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836, and note 814, 815. It is not competent to show by parol evidence that realty purchased by and conveyed to two persons as tenants in common was purchased as partnership property: *Ridgeway's Appeal*, 15 Pa. St. 177; 53 Am. Dec. 536; for intention to hold property as partnership property must appear in the deed: *Hale v. Henrie*, 2 Watts, 143; 27 Am. Dec. 289.

ESTATE OF CUNNINGHAM.

[187 PENNSYLVANIA STATE, 621.]

ESTATES OF DECEDENTS. — ELECTION BY WIDOW, allowed by statute, is a right to choose between abiding by her husband's disposition of his property or the right to disregard it and claim under the intestate law. These rights are inconsistent with each other, and cannot co-exist. She must choose one or the other, and cannot choose both; nor does her right of choice depend in any degree on the mention or omission of her in her husband's will, or on the *quantum* of benefit she receives or renounces under it.

ESTATES OF DECEDENTS. — ELECTION BY WIDOW. — Where the husband's will directs a conversion of his real estate into personalty, and the wife elects to take under the intestate law, her rights are fixed irrespective of the will, and she cannot claim that the conversion operates so as to entitle her to one half of the fund absolutely; for, as to her, the fund must be regarded as real estate, and she is only entitled to a half-interest therein for life.

ESTATES OF DECEDENTS. — Widow's right of election, given by statute, is paramount to her husband's power of disposition by will, and if she elects to disregard the latter, she can claim her statutory estate in the land itself and at law it is that only to which she is entitled; but in equity, if she has acquiesced in a sale made under the will, and made claim to the proceeds, she thereby relinquishes her dower, and the land passes to the purchaser discharged of her estate in it. The fund, however, arising from the sale is still treated as realty as to her, and she is entitled to a half-interest therein for life.

ESTATES OF DECEDENTS — ELECTION BY WIDOW. — The question whether a widow filed a formal paper, electing to take against the will, voluntarily, or under stress of an order of court, is entirely immaterial to her rights. Such writing is unimportant, except as evidence.

PETITION for the distribution of the proceeds of the sale of the estate of J. B. Cunningham, who died leaving a widow, but no children. The deceased did not name nor provide for his wife in his will, but directed that his executor sell and convey his real estate, and divide the proceeds thereof *pro rata* to his heirs and representatives at law. After the sale of the estate as directed in the will, the widow executed and filed a formal statutory election not to take under such will, but to take her share of the estate under the intestate laws. She claimed that the will worked a complete conversion of the testator's real estate in personalty, and that such conversion inured to her benefit, and entitled her to one half of the proceeds of the sale of such real estate. The auditor to whom the case was referred granted the prayer of the widow, and awarded to her absolutely one half of the fund arising from the sale of the real estate of the testator. From this award an appeal was taken.

J. M. Peoples and D. S. Atkinson, for the appellants.

James S. Moorhead and John B. Head, for the appellee.

MITCHELL, J. Election, in the sense that applies to the present contention, means a choice between two courses of action; acquiescence by the widow in her husband's disposition of his property, or disregard of it and assertion of the rights the law gives her. There is no third or mixed course. Her legal rights, which are paramount to the husband's control, attach *eo instanti* that he dies, and there is no interval during which the will can slip in and work a conversion, and then stand aside to let in her intestate rights upon the converted estate. Conversion takes place by virtue of the will, but as to the widow so electing, there is no will. She must make her choice; and it is, will or no will. She has time to

consider which she shall take, but the quality of the estate as to her rights is fixed at the moment of death, and she must take one or the other as they were then. The law does not permit her to say there is a will for conversion, and no will as to her share.

This was decided in *Hoover v. Landis*, 76 Pa. St. 354; but the learned auditor in the present case drew a distinction based on the fact that in Hoover's will provision was made for his wife, while in Cunningham's she was not named; but such a distinction is altogether untenable. Followed to its logical conclusion, it would result that a will which gave the widow one cent would require and support a valid election, while one which gave her nothing would not permit an election at all. The law does not sanction such an illusory distinction, and the argument which would support it is founded on wrong premises. The election which the widow is required to make is between rights, not between benefits. She has the right to abide by her husband's disposition of his property, or the right to override it and claim under the intestate law. These rights are inconsistent, and cannot co-exist. She has always the choice which she will assert, but the choice is of one or the other, not both, and does not legally depend in any degree on the mention or omission of her in the will, or on the *quantum* of benefits she receives or renounces under it.

Neither the act of April 8, 1833 (P. L. 249, sec. 11), nor the act of April 11, 1848 (P. L. 537, sec. 11), affects this question. The common-law rule was, that a devise or bequest to a wife was not in satisfaction or lieu of dower, unless so expressed in the will: Co. Lit. 36 b. The courts of equity relaxed this rule by holding that where the provisions of the will would otherwise be materially disarranged, an intention to make the devise in lieu of dower would be implied. This gave rise to frequent litigation as to the inconsistency of dower with the provisions of wills (see *Webb v. Evans*, 1 Binn. 565), and the act of 1833 (P. L., sec. 11), was meant to diminish this by establishing a fixed general rule. The act of 1848 (P. L. 537, sec. 11), simply secures the widow her choice between the provision for her in the will and her share under the intestate law of both personalty and realty.

As the widow's rights are paramount to her husband's power of disposition, she of course, at her election, could claim her statutory estate in the land itself, and in law it is this only to which she is entitled. But in equity, as she has acquiesced in

the sale and made claim to the proceeds, she must now be held to have relinquished her dower, and the land to have passed to the purchaser discharged of her estate in it. It is an estoppel by election. But the fund is to be treated as still realty, for the purpose of determining the *quantum* of her interest or estate in it, and that is for life only. One half of the fund, therefore, must be properly secured under the direction of the court, and the interest paid to her during her life.

Whether her filing of the formal paper, electing to take against the will, was voluntary, or under the stress of an order from the court, is entirely immaterial. Such a writing is proper for convenience and certainty of evidence, but is not otherwise important: *Light v. Light*, 21 Pa. St. 407; *Bradford v. Kents*, 43 Pa. St. 474; *Kennedy v. Johnston*, 65 Pa. St. 451; 8 Am. Rep. 650.

Decree reversed, and record remitted for distribution of the fund in accordance with this opinion.

WIDOW, ELECTION BY, TO TAKE OR NOT TO TAKE UNDER THE PROVISIONS OF A WILL made by her husband, when necessary and when not, see *Church v. Bull*, 2 Denio, 430; 43 Am. Dec. 754, and note. Compare *Woodburn's Estate*, 138 Pa. St. 606, *post*, p. 932, in which the election of a widow to take under her husband's will is held not to be binding upon her, when made in ignorance of the facts.

DAVIS SHOE CO. v. KITTANNING INSURANCE CO.

[188 PENNSYLVANIA STATE, 78.]

INSURANCE — VOID CONDITION IN POLICY. — A clause in a policy of fire insurance requiring the certificate of an officer in charge of the fire department to be furnished with proofs of loss is void.

INSURANCE — DUTY OF COMPANY IN REGARD TO PROOF OF LOSS. — It is the duty of an insurance company, on receipt of proofs of loss, to return them promptly if they are objectionable, pointing out the particular defects, and additional information required. To return them, accompanied with a general reply that they do not correspond with printed instructions, is insufficient to protect the company.

INSURANCE — WAIVER OF PROOF OF LOSS. — Where an insurance company retains proofs for fifty days, and then returns them without any specific objection, it waives its right to any further or more complete proofs, and will be bound on the policy, notwithstanding any conditions contained therein respecting such proofs.

W. D. Patton and H. L. Golden, for the appellant.

Ross Reynolds, Jr., and J. H. Painter, for the appellee.

PAXSON, C. J. The first assignment raises the only important question in this record. The plaintiff's second point requested the court to instruct the jury "that if the jury believe that the plaintiff company mailed final proofs of loss to the defendant company on February 25, 1888, and the defendant company received said proofs on February 28, 1888, and made no objection to the same before April 24, 1888, it is for them, the jury, to say whether such facts were sufficient evidence of waiver by the defendant company of any informality or deficiency in the proofs of loss." The learned judge below affirmed this point, and if he was right in this, the pivotal point of the cause, all that follows is of little moment.

There is not even an allegation that the policy of insurance was not taken out in the usual way, the premium fully paid, and the loss an honest one. The latter circumstance is not, perhaps, material, so far as it concerns the law of the case. It may affect the moral aspect of the defense. When an insurance company is defending against fraud, it might well be justified in resorting to even technicalities to defeat such claim. But when it has issued its policy and received the premium, it has entered into a contract of indemnity; and common honesty requires that it should keep such contract in good faith; and an attempt to defeat it by shifts, evasions, and bald technicalities can only be regarded with a feeling bordering closely upon contempt.

The plaintiff company was doing business in the state of Virginia. The property insured was located at Richmond. The defendant company is a Pennsylvania corporation having its principal office at Kittanning, Pennsylvania, with agents in different localities, whose business it is to solicit insurance. Much of its business appears to come from distant points, where it is least known. The policy in this case was for one thousand dollars, and during the life thereof, viz., on the morning of January 31, 1888, a fire occurred by which the property insured was injured, and destroyed in whole or in part. On the same day, the assured notified the company of the fire by letter, stating that the loss would probably be total. There being a large amount of insurance on the same property in other companies, the assured, on the eleventh day of February, notified the insurance company of the meeting of adjusters to adjust the loss and claims. Proofs of loss were made out and sent to the company on the 25th of February, within the time prescribed by the policy. The proofs were very full, and stated,

inter alia, that "any other information that may be required will be furnished on call." No notice of these communications was taken by the insurance company until April 24th, when the proofs of loss were returned to the assured, with a letter stating, generally, that they are "unsatisfactory and incomplete, in that it does not set forth, as required by section 10 of the printed conditions of said policy." Then follows a copy of the section, with the requisites of proofs of loss underscored.

There is not a single defect in the proofs pointed out, not a single subject named as to which the company desires other or fuller information, but the entire proofs were rejected with what amounts to a declaration that not one requisite had been complied with. In point of fact, there does not appear to have been anything omitted, unless it be the certificate of the officer in charge of the fire department, which certificate, under the ruling in *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535, the company had no right to demand. It was there held that a clause in a policy requiring such a certificate was void, this court saying, through Mr. Justice Gordon: "The company had no right to require a public officer to act in the adjustment of its risks, and the neglect of the assured to even ask a certificate from that officer would have been no default." It was further said in that case, and it is wholesome law, and directly applicable to the case in hand: "Besides this, it was the duty of the company, on the receipt of the proofs, to return them if they were objectionable, and point out the particular defects. This it refused to do, but replied, generally, that they did not correspond with the printed instructions, and refused to receive them. This was not sufficient. Insurance companies cannot expect thus to escape from the payment of an honest claim, through technicalities which do them no harm and which they themselves can easily cure." See also *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558, 15 Am. St. Rep. 739, where, in obedience to a call from the company, the assured sent his books for their examination. The books were kept, and not returned until after the limitation had expired. We said: "It was the duty of the company to examine the books and papers promptly, and notify the plaintiffs of the result."

Here the proofs of loss were kept for over fifty days, and then returned without a specific objection. A few days would be sufficient to enable any company to examine the proofs in a given case, and ascertain if they were satisfactory. If not so,

good faith requires that they should be promptly returned, and the specific omission pointed out, or the additional information wanted designated. The great mass of persons who insure their property are in the main ignorant of insurance law, and their business is often solicited by the agents of such companies; they are not accustomed to making out such papers as proofs of loss, and when they are defective the assured should be dealt with fairly, and no advantage taken of their ignorance. Here the proofs of loss having been kept for a long time, and then returned without specific objection, we think, under all our cases, the company waived its right to call for further proofs. The learned judge below submitted the question of waiver fairly to the jury, and they have found it in favor of the plaintiff. We are of opinion that their finding was justified by the facts in the case. It follows that the suit was not prematurely brought. We find nothing in the minor questions of the case which requires discussion. There is no substantial error.

Judgment affirmed.

FIRE INSURANCE — PROOFS OF LOSS. — The insurance company must point out any defects in the proofs of loss, so as to give the assured the opportunity of correcting them; and failing so to do, the company is presumed to have waived such defects: *Gould v. Dwelling-house Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717, and note; *German Ins. Co. v. Gray*, 43 Kan. 497; 19 Am. St. Rep. 150, and note.

ESTATE OF HANIKA.

[188 PENNSYLVANIA STATE, 330.]

JUDGMENTS — COLLATERAL ATTACK. — A judgment against the assignor of an estate for the benefit of creditors, and in favor of a creditor, cannot be collaterally attacked by other creditors on the ground that execution issued thereon prematurely; they can only attack it for fraud and collusion to hinder and delay them.

ASSIGNMENT for the benefit of creditors. Frank Hanika assigned for the benefit of his creditors, and his assignee, under order of court, sold his stock of goods and applied the proceeds to the satisfaction of several executions against him in the order of priority of date and lien thereof. The first of the judgments was in favor of Josephine Hanika, the wife of the assignor, for \$540, entered December 10, 1887, upon a judgment note of that date, and payable six months thereafter, on which execution issued and came into the hands of the

sheriff at 10:30 o'clock, A. M., December 15, 1887. The next judgment was in favor of Maloney Brothers, for \$367.50, entered December 15, 1887, on a judgment note of that date payable on demand, on which execution issued and came into the sheriff's hands at 1:30 o'clock, P. M., December 15, 1887. Objection was made by Maloney Brothers to the payment of the Hanika judgment, on the ground that execution thereon issued prematurely, and from a ruling that such judgment was a valid first lien on the sum to be distributed the Maloney Brothers take an appeal.

Frank Whitesell and William W. Whitesell, for the appellants.

Per CURIAM. There was no evidence before the auditor which would have justified him in postponing appellee's judgment in the distribution. It is true, the execution thereon was prematurely issued, but this was an irregularity of which only the defendant in the execution could take advantage: *Wilkinson's Appeal*, 65 Pa. St. 189. A judgment can be attacked by creditors collaterally only upon the ground of fraud and collusion to hinder and delay them. The charge of such fraud and collusion was made, but the auditor and court below have not sustained it, in which they were clearly right.

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

JUDGMENTS—EXECUTIONS.—An execution prematurely issued upon an existing judgment, though erroneous, is not void. It cannot be collaterally attacked by another execution creditor: *Stewart v. Stocker*, 13 Serg. & R. 199; 15 Am. Dec. 589, and note.

GERMAN NATIONAL BANK v. FOREMAN.

[128 PENNSYLVANIA STATE, 474.]

NEGOTIABLE INSTRUMENTS—BANK AS HOLDER OF NOTE OF DEPOSITOR—

DISCHARGE OF INDORSER.—Where a bank is the holder of a note payable at the bank, and upon its maturity the maker has a cash deposit in bank sufficient to pay it, not specially applicable to a particular purpose, the bank is bound to charge the amount of the note against the deposit. The note is, in effect, a draft on the bank in favor of the holder and in discharge of the indorser, notwithstanding a notice by the maker to the bank not to apply the deposit on the note, and an agreement by the bank, before maturity, not to charge the note against the deposit.

NEGOTIABLE INSTRUMENTS—NOTE IN HANDS OF BANK—RIGHT OF DEPOSITOR.—Where a depositor has made a special application or appro-

priation of his balance in bank, and has so notified it, it cannot charge off his note coming into its hands against his deposit upon maturity of the former.

C. Heydrick and Frank E. Bible, for the appellant.

T. J. Van Giesen and E. L. Davis, for the appellee.

PAXSON, C. J. The plaintiff bank had discounted the note in controversy, and was therefore the holder. At the time the note matured, John Shoup, the maker, had on deposit with the bank more than sufficient to pay it; but Shoup, conceiving that he had a defense as against the payee, notified the bank not to charge it off against his account at maturity, and at the same time gave the bank a bond of indemnity to secure it in case it failed to recover against the indorser. Being thus indemnified, the bank did not charge the note to Shoup's account, and brought this suit against the payee, who was of course indorser. The latter defended upon the ground that he was discharged as indorser by reason of the failure of the bank to collect the note from the funds of the maker in its hands. The court below held that the indorser was liable, and entered judgment against him for the amount of the note.

The case is ruled by *Commercial N. Bank v. Henninger*, 105 Pa. St. 496. It was there held that "where a bank is the holder of a note payable at the banking-house, and upon its maturity the maker has a cash deposit in said bank exceeding the amount of the note, which deposit is not specially applicable to a particular purpose, the bank is bound to charge up the amount of the note against the deposit. In such case the note is, in effect, a draft on the bank in favor of the holder, and in discharge of the indorser." The case in hand comes directly within this ruling. The money was there to the credit of the maker; it was not a special deposit, nor had it been specifically appropriated to any other purpose. The maker could have drawn his money out the day before the note matured; he might have turned it into a special deposit, or he might have appropriated it to the payment of some other note. As was said in *Commercial N. Bank v. Henninger*, 105 Pa. St. 496: "There is no doubt as to the right of the depositor to control his deposit up to the point where the rights of others attach. He may draw it out by his check; he may apply it to a particular purpose, by making it a special deposit, or by special directions communicated to the bank."

The learned judge below appears to have been misled by the

following passage from the opinion in the case referred to: "It must be conceded that if the deposit had been special, or if, previous to the maturity of the note, any arrangement had been made between the depositor and the bank by which the bank had been forbidden to apply the money in its hands to the payment of these notes, the indorser would not be discharged." The learned judge below has omitted the sentence immediately following, which explains what was meant by this language: "As was held in *National Bank v. Speight*, 47 N. Y. 668, 'if before the maturity of the paper held by a bank against a depositor an arrangement is made by which the bank agrees to hold the deposit for a specific purpose, and not to charge the note against it, the bank may be regarded as a trustee, and the deposit special. In such a case, in the absence of fraud or collusion, an indorser upon such paper has no right to require the application of the deposit towards the payment of the paper upon its maturity.'" Considering the above paragraph as a whole, it will be seen that it means merely that where a depositor has made a special application or appropriation of his balance, and so notifies the bank, the latter cannot charge off the note against his deposit. This arises from the fact that a man may do what he will with his own, so long as he retains control of it. Here the depositor retained full control over his deposit; made no appropriation of it, but retained it subject to his check; then, by a collusive arrangement with the bank, which was the holder, induced the latter to violate its duty to the indorser. It was an arrangement which the bank had no right to make. That the deposit did not, in any sense, become a special one, is shown by the fact that it remained in the bank subject to Shoup's check. Being so subject, it was the duty of the bank to charge off the note against it, and by its failure to do so the indorser is discharged.

Judgment reversed.

BANKS AND BANKING. — RIGHT OF A BANK to pay the note of its depositor, when such note is made payable at the bank, and such depositor has funds on deposit sufficient to discharge the note, see *Bedford Bank v. Acorn*, 125 Ind. 584; *ante*, p. 258, and note.

FIDELITY INSURANCE, TRUST, AND SAFE-DEPOSIT
COMPANY v. WESTERN PENNSYLVANIA AND SHE-
NANGO CONNECTING RAILROAD COMPANY.

[128 PENNSYLVANIA STATE, 494.]

CORPORATIONS, UNAUTHORIZED MORTGAGE BY — LIEN OF MORTGAGEE AS AGAINST CREDITOR. — A mortgage given by a railroad company to aid in constructing and equipping its road, and for a greater sum than twice the amount of its paid-up capital stock, is unauthorized and void as between it and its stockholders; but as between *bona fide* holders of the mortgage bonds and the corporation or its subsequent creditors with notice of the mortgage, the latter is a first lien on the mortgaged property, and such creditors cannot set up the fraud of the corporation as a defense against such bond-holders.

MORTGAGE BONDS, RIGHT OF HOLDER OF, AS AGAINST COUPON-HOLDER. — Where interest coupons of mortgage bonds have been presented and paid for with money supplied by a third person, under a private agreement between him and the mortgagor that such coupons should be treated as unpaid, and the third party treated as an original holder, with the right to share in the proceeds of the sale of the mortgaged property equally with the bond-holders, such agreement is void as to the latter.

J. Ross Thompson and John P. Vincent, for the appellants.

Johns McCleave, George Shiras, Jr., and A. F. Henlein, for the appellees.

WILLIAMS, J. The fund for distribution in this case was raised by a sale of the franchises, road-bed, and other property of the Western Pennsylvania and Shenango Connecting Railroad Company. The sale was made under a decree of the court below, in a proceeding begun by the Fidelity Insurance, Trust, and Safe-deposit Company, the trustee named in the mortgage or trust deed given by the railroad company to secure its bonds for the foreclosure of the mortgage and the sale of the mortgaged property. By the terms of the decree, the sale divested all liens, and passed an unencumbered title to the purchaser. The proceeds are claimed by the bond-holders, and are insufficient to pay them. The appellants are general creditors, and claim the right to a *pro rata* share in the fund. It appears that the railroad company had an authorized capital of five hundred thousand dollars, all of which had been subscribed, but only twelve thousand of which had been paid. Its right to borrow money on the security of a mortgage of its franchises was limited by law, in the clearest manner, to twice the amount of its paid-up capital. The directors, utterly disregarding the law and their own official

duty, authorized a loan of four hundred thousand dollars, and executed a mortgage on the franchises of the company and its unbuilt line of road to secure bonds for that sum. The bonds were issued, negotiated, and are held or represented by the appellees. The position of the general creditors is, that because the mortgage was unauthorized it is not a lien, and, as evidence of indebtedness, is of no higher grade than the notes or other securities held by themselves. This raises one question.

It must be conceded at the outset that the mortgage was unauthorized, and might be held to be inoperative and void if proper parties were before us. This court expressed its opinion upon the conduct of the directors of this road in *Reed's Appeal*, 122 Pa. St. 565, and characterized it as a "clear and highly reprehensible violation of law." The language is none too strong. The remedy is for the law-makers, and it is to be hoped that punishments will be provided for the directors who authorize and the officers who execute such mortgages, and for the financial agents who negotiate the bonds so unlawfully issued, of sufficient severity to protect an innocent and confiding public against the repetition of such gross and shameless frauds. But none of the guilty parties are before us. Their victims, the holders of the bonds, are the claimants, and we are to consider their rights in the premises. If this contest were between them and the company, it is plain that the company could not be heard to allege its fraud as a defense against those whom it had defrauded. By making the mortgage and negotiating the bonds, it represented to the public that its paid-up capital was sufficiently large to authorize the loan. It would be estopped from denying the truth of that representation now, when called upon to pay the bonds so negotiated. It cannot keep the money which it secured as the price of the bonds, and defend against their payment on the plea of *ultra vires*. If a stockholder or other party interested had asked it, the court would have enjoined against the execution of the mortgage, or the negotiation of the bonds, or the use of the money received for them; but no one asked it.

The fraud was carried out without interruption, and the money obtained by means of it is gone. The company is insolvent. The property pledged for the payment of this unauthorized loan has been sold, and its proceeds are before us. Who is entitled to take them? As between the bond-holders and the company, the mortgage was a lien on the property,

and is now a lien on the proceeds. This was held in *Reed's Appeal*, 122 Pa. St. 565. Such being the fact, the bond-holders are entitled to the money as against the company and all persons holding under it with notice of their position. The mortgage was authorized, executed, and recorded, and the negotiation of the bonds was in progress, when the appellants gave the credits on which their claim is based. They had full notice of the mortgage, and must be regarded as electing to give credit subject to the mortgage. The decree of the court below left them in no worse position than that which they voluntarily assumed, and they have no right to ask us to place them in a better one. The question before us is thus seen to be, not one of the power of the company to execute such a mortgage, but of the right of the company, and those standing in the same position, or deriving rights from it with full notice, to set up its fraud as a defense against the victims of that fraud.

The constitutional provision relied on is not applicable. The debt is not fictitious, though the securities may turn out to be largely so.

The position of the Pennsylvania railroad as a holder of interest coupons is not different from that of any other creditor whose advances were made with full notice of the mortgage. The Western Pennsylvania and Shenango Connecting Railroad Company defrauded its bond-holders when it sold them bonds that rested on no real security, and were issued without the authority of law; but it could not diminish the value of such securities as were pledged, by a private arrangement that coupons paid in accordance with their terms should be treated as unpaid, and that parties advancing the money with which to pay them should be treated as original holders, and be allowed to share in the proceeds of the mortgaged property equally with the holders of the bonds. The bond-holders are the only parties who could make such an arrangement, and they have not been consulted.

The judgment is affirmed.

CORPORATIONS — RIGHT TO INSIST UPON THE INVALIDITY OF A MORTGAGE.
 — When a corporation borrows money, and uses the same for its own benefit, executing and delivering a mortgage to secure the payment thereof, neither the corporation nor its stockholders can contend that the mortgage is void because the corporation exceeded its powers in engaging in such a transaction. The doctrine of *ultra vires* only concerns the corporation in its relation to its stockholders and the state, and is never entertained, where it works an

injury to innocent third persons: *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412, and note; *Sherman Center T. Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134, and note. Compare *Brown v. Atchison*, 39 Kan. 37; 7 Am. St. Rep. 515; *Memphis etc. R. R. Co. v. Grayson*, 88 Ala. 572; 16 Am. St. Rep. 69; *Jamison v. Citizens' Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482.

ELLIS v. LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY.

[128 PENNSYLVANIA STATE, 506.]

RAILROADS — NEGLIGENCE — DANGEROUS CROSSINGS — RATE OF SPEED. —

Where a railroad crossing is dangerous, the company does not perform its whole duty to travelers in the highway by sounding the whistle and bell at a proper distance as the train approaches such crossing. It owes the additional duty to such travelers to pass such crossing at a reasonable rate of speed, proportioned to the danger, and is guilty of negligence in crossing at a high rate of speed.

NEGLECTENCE IN ABSENCE OF CARE, ACCORDING TO CIRCUMSTANCES, and must be measured by the apparent danger; and while a high rate of speed by railroad trains is allowable in rural districts, the same rate of speed may be attended with peril to life in more thickly populated sections and at dangerous crossings, and may constitute negligence.

RAILROADS — NEGLIGENCE — DUTY OF TRAVELER TO STOP, LOOK, AND LISTEN. — A traveler by vehicle on a highway, about to cross a railway track at a public crossing, who can obtain a view of track up and down without alighting, need not alight and go upon the track to look and listen for approaching trains before attempting to cross. The question whether or not, in a given case, the traveler stopped at the best place to look and listen is necessarily one of fact to be determined by the jury.

WITNESSES, INSTRUCTIONS MAY CALL ATTENTION TO INTEREST OF. — In an action against a railroad company to recover for personal injury received at a public crossing, the instructions may call attention to the interest of the engineer and fireman of the train, in testifying for the company, if they also call attention to the interest of plaintiff in testifying for himself.

TRESPASS to recover for personal injury in consequence of negligence. Plaintiff and his two sons were driving a team of horses with an empty wagon and a yoke of oxen along a public road in the outskirts of Stoneboro. The eldest son, aged seventeen years, was in advance, on foot, driving the oxen, while the father and younger son, aged thirteen years, were in the wagon. The road was crossed by defendant's railroad track, and a special train operated by such company struck plaintiff as he was attempting to cross the track, inflicting the injuries which form the basis of this action. The remaining

facts are stated in the opinion. Verdict and judgment for plaintiff, and defendant appeals.

S. R. Mason, George G. Green, and O. G. Getzen Danner, for the appellant.

S. H. Miller, Q. A. Gordon, and James A. Stranahan, for the appellee.

PAXSON, C. J. We do not think it was error to decline to affirm the defendant's first point. The vice of the point is, that it assumed that the railroad company had performed its whole duty, provided the whistle was sounded and the bell rung at a proper distance from the crossing. But there was another element in the case which the jury were necessarily compelled to pass upon, viz., the rate of speed at which the train approached the crossing. The character of the crossing itself was a circumstance which could not be ignored, and which necessarily affected the relative duties of both the plaintiff and the company. If it was a dangerous crossing, as was practically admitted on both sides, it was the duty of the plaintiff to exercise the more care in approaching it. At the same time, it was equally the duty of the defendant company to see that their trains passed it at a reasonable rate of speed, proportioned to the danger. In other words, negligence is the absence of care, according to the circumstances, and must be measured by the apparent danger. While a high rate of speed is allowable, and perhaps necessary, in rural districts, the same rate of speed might be attended with peril to life in more thickly populated sections, and at dangerous crossings.

By the defendant's second point the learned judge was asked to instruct the jury that if they "find that there were obstructions in the way which prevented the plaintiff from seeing down the track as he approached the same, and from the point where he testifies he stopped, then it was his duty as a prudent man not only to look and listen, but also to get out of his wagon and go upon the track and look for approaching trains, and if necessary, to lead his horses across. Anything short of this would be contributory negligence on his part, and there could be no recovery in this case."

The learned judge answered this point as follows: "The evidence on the part of the plaintiff tends to show that the plaintiff had a good view of this road from his wagon up and down at the point where he first stopped, and between that

and the point where the next stop was made, as well as at the point where he stopped the last time. We are not warranted in affirming this second proposition of law. We refuse it, leaving it to the jury to say whether the plaintiff did stop and look and listen at a place where he could see up and down the track, and whether he used due care and diligence in approaching that crossing as ought to be used by a man of ordinary care and prudence."

The above point was evidently based upon *Pennsylvania R'y Co. v. Beale*, 73 Pa. St. 504, 13 Am. Rep. 753, where the rule is laid down that it is the duty of a traveler, when about to cross a railroad, if he cannot see the track, to stop, look, and listen, and if necessary, to get out and lead his horse. This principle is there stated to be an unbending rule, and its neglect to be negligence *per se*. We have enforced this principle in a number of later cases, which it is not necessary to cite.

The difference between the case cited and the one in hand is this: In the former, the person injured did not stop; while in the latter, the plaintiff stopped twice, and both looked and listened. It appears that the road which the plaintiff was traveling crosses two railroads about three hundred feet apart. The plaintiff testified that before he crossed the first road, the New Castle and Franklin, he stopped on a bridge from where he had a full view of both roads, and listened and looked for trains. He further said: "After we crossed the New Castle and Franklin railroad, I proceeded to cross the Jamestown and Franklin, or Lake Shore, railroad (defendant company's road). As I drove along there, I was standing up back of the seat. As I drove across between the New Castle and Franklin and Lake Shore railroads, I think I had full view of the Lake Shore road towards Stoneboro, the most of the distance. I neither heard nor saw any train on the Lake Shore road; everything was perfectly still. Before I undertook to cross the Lake Shore road, I stopped and looked and listened for trains on it, because there was considerable lumber piled up on it. At the point where I stopped, I think it was about two rods from the Lake Shore road; it might have been a little more or less. At that time I neither saw nor heard any trains on the road."

It will thus be seen that the plaintiff so far complied with the rule laid down in *Pennsylvania R'y Co. v. Beale*, 73 Pa. St. 504, 13 Am. Rep. 753, as to stop, look, and listen twice before

he attempted to cross defendant's road. Did he stop at the right place? and was it his duty to go upon the track? The latter can only be necessary when he can get a view of it in no other way, which does not appear to have been the case in this instance. The first branch of the inquiry was for the jury; and it would have been error in the learned judge to have ruled it as a question of law. In *Lake Shore etc. R'y Co. v. Frantz*, 127 Pa. St. 297, the plaintiff was injured by the collision of his wagon and a hand-car at a public crossing. It was partially obstructed by standing cars. The defendant moved for a compulsory nonsuit on the ground of contributory negligence, alleging that it was the duty of the plaintiff to stop, look, and listen at a point where he could see the main tracks of defendant's railroad. The court below refused to grant a nonsuit, and also refused to charge that the plaintiff was guilty of contributory negligence. Upon appeal to this court, it was said by Mr. Justice Mitchell: "A nonsuit could only be granted on the ground of manifest contributory negligence of the plaintiff. This we do not find. There were a number of tracks, and the evidence is strong that the plaintiff stopped, looked, and listened before crossing the first. It might still have been his duty to stop again before going upon the track of the defendant company on which the collision took place, but the evidence does not enable us to say so as a matter of law. It is far from clear that the place where plaintiff stopped was not the best, or that there was any safe place for a second and better view. It was proper, therefore, that the case should be left to the jury, and the nonsuit was rightly refused." In *McNeal v. Pittsburgh etc. R'y Co.*, 131 Pa. St. 184, the plaintiff stopped within fifty feet of the track, and it was presumed he looked and listened; and it was left to the jury to say whether he had exercised due care. *Pennsylvania R'y Co. v. Beale*, 73 Pa. St. 504, 13 Am. Rep. 753, does not appear to have been referred to in that case. While the rule to stop, look, and listen is an invaluable one, and may be properly declared by the court as a matter of law, yet the question whether a traveler, in a given case, has stopped at the best place is necessarily a question of fact, not of law. If I am right in this, it must, as a general rule, be passed upon by a jury.

We find no error in the qualification which the learned judge gave to the defendant's third point. The rate of speed of a railroad train at a public grade crossing has been suffi-

ciently referred to in the remarks upon the first assignment of error. A considerable portion of the charge of the court below is also assigned as error. We cannot say that the reference to the speed of the train was wrong. On the contrary, the charge in this respect was entirely fair. It is true, he said to the jury: "If that rate of speed was from forty-five to sixty miles an hour, as it is claimed on the part of the plaintiff," etc. Here the learned judge only stated what the plaintiff claimed as the rate of speed, and while no witness stated, in terms, if I am correct in my examination of the testimony, that the train was running at the rate of sixty miles an hour, yet there was evidence from which the jury might have found the fact inferentially. On the other hand, the learned judge fairly stated what the defendant claimed as to speed. The testimony upon this point, as is usual in such cases, was vague and unsatisfactory.

Complaint was also made that the learned judge called attention to the fact that the engineer and fireman of the train were interested witnesses in one sense, although not affected by the verdict pecuniarily. What the learned judge said upon this point was entirely true, and it was proper to call the attention of the jury to it. There might have been a good ground of objection, had the learned judge referred only to these two witnesses. But he pointedly called the attention of the jury to the interest of the plaintiff and his two sons, and told them that it affected their credibility. The reference in each case was proper.

We need not notice the last assignment.

Judgment affirmed.

RAILROADS. — DUTY TO PERSONS ON OR APPROACHING THE TRACK: See *McMarshall v. Chicago etc. R'y Co.*, 80 Iowa, 757; 20 Am. St. Rep. 445, and note 452, 453, in which note it is stated that railroad companies need only slacken the speed of their trains approaching public crossings when it is necessary to prevent accidents. See also *Heddles v. Chicago etc. R'y Co.*, 77 Wis. 228; 20 Am. St. Rep. 106, and note 114, 115.

RAILROAD TRACKS, DUTY OF PERSONS APPROACHING. — A railroad track is notice to one approaching it of danger, and he must stop and look and listen before going upon it: Note to *McMarshall v. Chicago etc. R'y Co.*, 20 Am. St. Rep. 453; note to *Heddles v. Chicago etc. R'y Co.*, 20 Am. St. Rep. 114, 115.

HOLMES v. CHARTIERS OIL COMPANY.

[188 PENNSYLVANIA STATE, 546.]

CONTRACT—PERFORMANCE—EVIDENCE.—Where, in an action to recover under a contract to drill an oil-well at a certain price per foot, a substantial compliance with the terms of the contract is shown, evidence of the average cost of drilling a well at the time of the drilling of the one in suit is immaterial and inadmissible.

CONTRACT—SUBSTANTIAL PERFORMANCE—MEASURE OF RECOVERY.—Where, under a parol contract to drill an oil-well at a certain price per foot, the contractor has drilled the well to such depth as to produce oil, and has then lost his tools and left them in the well, after which the owner has taken possession and used the well for the production of oil, the contractor is entitled to recover the contract price for drilling the well, less such deduction for damages as will compensate the owner for loss sustained by the failure of the contractor to remove his tools from the bottom of the well.

T. F. Birch, for the appellant.

J. M. Braden, John W. Donnan, and Alvan Donnan, for the appellees.

PAXSON, C. J. This record presents two questions, viz.: (a) What was the contract between McCauley Brothers and the Chartiers Oil Company? and (b) Was the contract substantially performed by McCauley Brothers? The first of these questions the court below submitted to the jury, for the reason that the contract was oral. The law is well settled that where a contract is in writing, its construction is for the court; where it is oral, it is for the jury: *McFarland v. Newman*, 9 Watts, 59; 34 Am. Dec. 497; *Sidwell v. Evans*, 1 Penr. & W. 386; 21 Am. Dec. 387. The second question was necessarily for the jury. They have determined both in favor of the plaintiffs, and unless there be error in the manner of their submission, the judgment must stand.

The first three assignments of error are to the rejection of certain testimony offered on the part of the defendant. As to the offers embraced in the first and second assignments, we are unable to see their relevancy. The contract, as claimed by McCauley Brothers and as found by the jury, was to sink an oil-well at the price of \$1.75 per foot, without specifying the depth. The well was drilled to a depth of about two thousand four hundred feet, and until it had passed from seventy to eighty feet through what is known as the Gantz sand, when the tools were lost and could not be recovered. The garnishee

company appear then to have taken possession of the well, tubed it, and pumped two thousand or more barrels of oil therefrom. The attaching creditors, representing the contractors, claimed that there had been a substantial compliance with the contract; the oil company claiming that the contract was entire, and that there was no such compliance therewith as would entitle McCauley Brothers to recover. Under this state of facts, we are unable to see the relevancy of the testimony referred to. The claim on behalf of McCauley Brothers was to recover the contract price of sinking the well, less such deduction for damages as would compensate the company for any loss sustained by it on account of the failure of McCauley Brothers to remove the tools from the bottom of said well. It is obvious, therefore, that an inquiry into the average cost of drilling a well in 1886 could not have thrown any light upon the issue before the jury. Its only effect would have been to mislead them.

The evidence referred to in the third assignment was competent, and had the company offered to prove it by a competent witness, the learned judge would have admitted it. He excluded it on the ground that the witness on the stand had no personal knowledge of the facts he was called to testify to. All his knowledge was derived from his superintendent, who had made the measurements.

The remaining assignments allege error in the answers to the points submitted by the respective parties. Although presented in different forms, they all raise the single question, Was there a substantial compliance with the contract? The plaintiffs' fourth point called upon the court to instruct the jury as follows: "If the jury find from the evidence that McCauley Brothers drilled an oil-well for the defendant company to such a depth as answered the intended purpose, and that the well was taken possession of by the defendant, and was used for the production of oil, then the plaintiffs are entitled to recover the contract price for the drilling of the said well, less such deduction for damages as will compensate the defendant company for any loss sustained by it on account of the failure of McCauley Brothers to remove the tools from the bottom of said well."

This point the learned judge below affirmed. The rule upon this subject may be found in *Danville Br. Co. v. Pomroy*, 15 Pa. St. 159: "Where a thing is so far perfected as to answer the intended purpose, and it is taken possession of and turned

to that purpose by the party for whom it was constructed, no mere imperfection or omission which does not virtually affect its usefulness can be interposed to prevent a recovery, subject to a deduction for damages consequent upon the imperfection complained of. Of course the indulgence is not to be so stretched as to cover fraud, gross negligence, or obstinate and willful refusal to fulfill the whole engagement, or even a voluntary and causeless abandonment of it." This rule was cited and approved in *Pepper v. Philadelphia*, 114 Pa. St. 96, and in other cases.

It was urged, however, that the recent case of *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, is in conflict with this view. We do not so regard it. In that case there was a willful departure from the terms of the contract in several respects, as will readily be seen by the following extract from the opinion of Mr. Justice Sterrett: "In several particulars the work contracted for was not done according to the plain terms of the contract. Nearly one half of the well was not reamed out, as required, to an eight-inch diameter, so as to admit five-and-five-eighths-inch casing in the clear. About 180 feet of the lower section of the well also was bored four or four and one quarter inches, instead of five and five eighths inches in diameter. In neither of these particulars, nor in any other respect, was there any serious difficulty in the way of completing the work in strict accordance with the terms of the agreement." The difference between that case and this is so obvious that extended comment is unnecessary. In the former there was a willful departure from the terms of the contract, for which no excuse or justification was offered. In this case there appears to have been no such departure. The jury have found that the well had been drilled to a proper depth, and the only omission was to fish up the tools from the bottom of the well, which, the evidence shows, the contractors were unable to do. The loss of the tools in this manner was a matter which might occur to any contractors. The well, as drilled, was a producing well, and the jury were properly instructed to deduct from the contract price any loss or damage which the company sustained by reason of the tools remaining therein.

Judgment affirmed.

CONTRACTS — MEASURE OF DAMAGES. — The measure of damages for furnishing defective articles or for performing inferior work, where the contract calls for first-class articles or first-class work, is the difference between the

contract price and the actual value of the thing furnished or the work performed: *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299; *Blanchard v. Ely*, 21 Wend. 342; 34 Am. Dec. 250, and note; *Hoemer v. Wilson*, 7 Mich. 294; 74 Am. Dec. 716; *Hillyard v. Crabtree*, 11 Tex. 264; 62 Am. Dec. 475, and note.

RAY v. WESTERN PENNSYLVANIA NATURAL GAS COMPANY.

[186 PENNSYLVANIA STATE, 576.]

LANDLORD AND TENANT — BREACH OF CONDITION IN LEASE — RE-ENTRY BY LANDLORD IN POSSESSION. — Where by the terms of a lease the landlord is entitled to remain in possession subject to the rights of the tenant, the landlord need not make a formal re-entry, in order to take advantage of the breach of a forfeiture clause inserted in the lease for his benefit. His election to forfeit while he is in actual possession is a constructive entry under his title.

LANDLORD AND TENANT — FORFEITURE OF LEASE FOR BREACH OF CONDITION. — Where a condition in a lease is inserted solely in the interest of the landlord, the lease is void upon a breach of the condition, if the landlord by some positive act elects to take advantage of it, but the tenant cannot set up his own default as a cause of forfeiture.

LANDLORD AND TENANT — FORFEITURE OF LEASE AS DEFENSE BY TENANT. — Where a lease contains a forfeiture clause providing that the tenant shall complete an oil-well within a certain time or pay the landlord specified sums semi-annually until completion, and in default of performance of such condition the lease shall become null and void, the landlord has the option either to declare a forfeiture or to affirm the continuance of lease after a breach of the condition; and if he does not choose to avail himself of the forfeiture, it cannot be set up as a defense by the tenant to an action in affirmance of the lease.

CONSTITUTIONAL LAW — JUDGMENT IMPAIRING OBLIGATION OF CONTRACT. — In order to constitute a judgment subject to review as impairing the obligation of a contract, the case must involve the constitution, or a statute, or some enactment that has the force of law, either of the state or of some municipality exercising legislative power delegated by the state, which impairs the obligation of such contract.

LANDLORD AND TENANT — ENFORCEMENT OF LEASE BY MARRIED WOMAN. — Where a married woman whose lease is not binding upon her, because not properly acknowledged, has complied with all the conditions thereof, her coverture cannot be set up as a defense in an action on the lease.

D. T. Watson, David Sterrett, and H. A. Miller, for the appellants the Western Pennsylvania Natural Gas Company.

H. A. Miller, for appellant *T. J. Vandergrift*.

John L. Gow and Thomas McK. Hughes, for the appellees *J. Ray* and *J. A. Smiley*.

John S. Lambie and A. M. Brown, for the appellees *Eva C. Agerton* and *J. Mertz, Jr.*

CLARK, J. This appeal is taken from the judgment of the common pleas, entered for want of a sufficient affidavit of defense.

The action is *assumpsit* to recover certain sums, stipulated in a gas or oil lease, for delay or default in operating the lease. The lease is dated July 7, 1888, James Ray, the party of the first part, being the lessor, and the Western Pennsylvania Natural Gas Company, the party of the second part, the lessee. The lease provides that in consideration of certain rents and royalties the said Ray hath granted, demised, and let unto the said company, "for the sole and only purpose of drilling and operating for petroleum oil and gas, for the term of two years, or so long thereafter as oil or gas is found in paying quantities, a certain tract of land in Cross Creek township," etc.; the party of the second part agreeing, in consideration, "to give said first party one eighth of all the oil from wells producing less than fifty barrels per day, and one fourth of the oil from all wells producing more than fifty barrels per day"; and further, "to give five hundred dollars per annum for the gas from each and every well drilled," etc., in case the gas is conducted and used off the premises. The particular clause of the contract upon which suit is brought is as follows: "The party of the second part agrees to pay, within ten days from the execution of this lease, the sum of fifty-three dollars; and if a well is not completed within six months from the execution of this lease, the said second party agrees to pay a further sum of fifty-three dollars, and so on continually every six months, during the continuance of the term herein specified. The said sum of five hundred dollars gas rent shall be paid within one month from the time said well is completed on said premises, and to be paid annually, in advance, thereafter. It is further agreed by said second party that if a well is not completed within fifteen months from the date of this lease, they are to pay a further sum of \$250, said sum to be a credit on well when drilled; and in case of failure to complete one well within such time, the party of the second part hereby agrees to pay thereafter to party of the first part, for any future delay, the sum of \$106 per annum within one month after the time for completing such well, as above specified, payable semi-annually at the First National Bank of Washington, Pennsylvania; and the party of the first part hereby agrees to accept such sum as full consideration and payment for such yearly delay, until one well shall be com-

pleted. And a failure to complete one well, or to make any such payment within such time and such place, as above mentioned, shall render this lease null and void, and to remain without effect between the two parties."

The plaintiff's statement averred that the defendant had never completed a well on the demised premises, and claimed to receive \$53, due January 7, 1889; \$53, due July 7, 1889; \$250, due October 7, 1889; and \$53, due January 7, 1890. The affidavit of defense set forth, in substance, that by the terms of the lease the only right granted was the right to operate for gas or oil; that the defendant never entered into the possession for this purpose, while the plaintiff, not only at the time of the lease, but when the several sums sued for became due respectively, was and still is in possession of the land described in the lease, and that, under these circumstances, and according to the law as declared in the decisions of this court, the lease, by its terms, on the defendant's failure to put down one well, or to make any one of the payments specified, became *ipso facto* null and void, without re-entry, and that therefore there is now no liability upon the part of the defendant either to pay or to perform.

The case is in all respects governed by our decision in *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222. It is true, the lessor's possession was not alluded to in the discussion and decision of that case, nor do we regard the question whether or not he was in possession subject to the lease as a matter of any great significance. We agree with the appellant in its contention that if in such a case as this the lessor should choose to avail himself of the forfeiture clause in his contract, a formal re-entry, to take advantage of the breach, was not required; the authorities cited by the appellant are decisive of the question. In *Hamilton v. Elliott*, 5 Serg. & R. 375, there was a conveyance of a freehold by A to B, upon certain conditions which were not complied with, the grantor, in accordance with the terms of the grant, remaining in the possession from the time of the conveyance until after the forfeiture accrued; and it was held, in a suit by the assignee of A, that by reason of the breach of the condition whilst A was in the actual possession, the estate reverted in A without a formal entry to take advantage of the breach or notice of the non-performance of the condition. As the grantor was already in the possession, it was deemed unnecessary that he should go out in order that he might re-enter, or that the grantee

should have formal notice of what he already knew; viz., that the condition was not performed. To the same effect are the other cases cited by the appellant: *Dickey v. McCullough*, 2 Watts & S. 99; *Feather v. Strohoecker*, 3 Penr. & W. 508; 24 Am. Dec. 342; and *Bear v. Whisler*, 7 Watts, 149. The same rule has been applied to leases for years: *Kenrick v. Smick*, 7 Watts & S. 41; *Sheaffer v. Sheaffer*, 37 Pa. St. 525; *Davis v. Moss*, 38 Pa. St. 346; *Brown v. Bennett*, 75 Pa. St. 420; *Brown v. Vandergrift*, 80 Pa. St. 142; and *Munroe v. Armstrong*, 96 Pa. St. 307. But as by the terms of the lease Ray, the plaintiff, was entitled to remain in possession of the land, subject to the right of the company to drill and operate for oil and gas, his occupancy of the land at and after the time of the breach can be of little consequence, unless by some act in assertion of the forfeiture he gave it a greater effect. It was certainly not necessary that he should abandon the possession, to which, by the very terms of his contract, he was entitled, in order that he might insist upon performance by the lessee; the lessor's election to forfeit whilst he is in the actual possession may be regarded as a constructive entry under his title.

But it is said that the doctrine declared in *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222, is an innovation or change in the law; that the parties must be presumed to have contracted in view of the general law as it was expounded when their engagements were formed; and to determine the legal effect of the contract otherwise is to impair its obligation, in contravention of the tenth section of the first article of the federal constitution. In *Kenrick v. Smick*, 7 Watts & S. 41, and in *Sheaffer v. Sheaffer*, 37 Pa. St. 525, although the condition in each case was inserted in the interest of the lessor, it was held that upon breach of the condition by the lessee, the lease was *ipso facto* absolutely void without re-entry, and could not afterwards be affirmed or continued by any subsequent recognition of the tenancy on part of the lessor, or by any act of his, other than the making of a new lease. But, as we said in *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222, the rigor of the rule was relaxed in *Davis v. Moss*, 38 Pa. St. 346, where the forfeiture was said to depend upon the terms of the instrument, "unless there be evidence to affect the landlord with a waiver of the breach, like the receipt of rent or other equally unequivocal act," in which case the lease may be continued at the instance of the lessee. The ruling in *Davis v. Moss*, 38 Pa. St. 346, was the

first step in the transition from the doctrine of *Kenrick v. Smick*, 7 Watts & S. 41, to the now well-settled rule laid down in *Galey v. Kellerman*, 123 Pa. St. 491, and *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222, where the principle is established that where the condition appears to have been inserted solely in the interest of the lessor, the lease is void upon the breach, if the lessor by some positive act elects to take advantage of it. The departure from *Davis v. Moss*, 38 Pa. St. 346, is greater, perhaps, than the reasoning in the case last cited would seem to indicate, but it was taken on due deliberation and careful study of the principles involved, and we are not inclined to recede from the position assumed.

It is a somewhat significant fact that in all the cases cited, including *Davis v. Moss*, 38 Pa. St. 346, the forfeiture was set up by the lessor, in whose interest the condition was inserted, upon the default of the lessee; in none of them, as in the case at bar, did the lessee set up his own default as a cause of forfeiture. No case has been brought to our notice in which the lessee was allowed to take advantage of his own wrong, or to set up his own default, to work a forfeiture of his own contract; it must be conceded, however, that if the old rule is the right one, this anomalous result must ensue. Persons may, perhaps, contract expressly in this form, and to this effect; when they do, the transaction amounts to a mere option, and the lessee in setting up his own default simply avails himself of an elective right secured to him in his contract. We do not understand the contract in suit to be of this character. The clear purpose of the lessor was to have his lands operated for oil or gas, and the condition was inserted for his benefit. Whilst the obligation on part of the lessee to operate is not expressed in so many words, it arises by necessary implication. The lease was for the express purpose of drilling and boring for oil or gas, the lessor in a certain event to receive a share of the production as a royalty or rent, and in another event to be paid five hundred dollars per annum for each gas-well the product of which was conducted from the land for consumption. If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land; an engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied. The clear purpose of the parties to this lease was to have the

lands developed, and the half-yearly payments and the other sums stipulated were intended not only to spur the operator, but to compensate Ray for the operator's delay or default. The lessor's hands have been tied for two years. We do not know that he lost anything in royalties, or that he suffered by drainage, for the territory might have proved unproductive; but as the transaction was founded in the hope that either oil or gas, or both, might be found in paying quantities, it was competent for the parties to contract in advance for the amount of compensation to which, in the event of delay or default in development, the lessor would be entitled. The provision for forfeiture was doubtless inserted in anticipation that the lessee might make default and become unable to pay, in which event he might put an end to the lessee's pretensions, and seek other means of development. This clause having been inserted as a protection to the lessor, he had the right either to declare the forfeiture or to affirm the continuance of the contract; and if the lessor did not choose to avail himself of the forfeiture, the lessee cannot set it up as a defense to an action in affirmance of the contract: *Galey v. Kellerman*, 123 Pa. St. 491; *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222.

The courts of highest authority of all the states, and of the United States, are not infrequently constrained to change their rulings upon questions of the highest importance. In so doing, the doctrine is, not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary in no proper sense can be said to make or change the law; they simply expound and apply it to individual cases. To this general doctrine there is a well-established exception, as follows: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same, in effect, on contracts as an amendment of the law by means of a legislative enactment": *Douglass v. Pike Co.*, 101 U. S. 677. See also *Anderson v. Santa Anna*, 116 U. S. 361, and cases there cited; Cooley's Constitutional Limitations, 474-477. To this effect, and no more, we understand to be the cases of *Ohio etc. Trust Co. v. Debolt*, 16 How. 432; *Gelpcke v. Dubuque*, 1 Wall. 175; *Hattemeyer v. Iowa Co.*, 3 Wall. 294; *Olcott v. Supervisors*, 16

Wall. 678. In *Ohio etc. Trust Co. v. Debolt*, 16 How. 432, the doctrine is thus stated: "The sound and true rule is, that if a contract, when made, was valid by the laws of the state as then expounded by all the departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature, or the decision of its courts altering the construction of the law." The ruling applies, it will be observed, not to the general law common to all the states, but to the laws of the state "as expounded by all the departments of its government"; and it is held that contracts valid by these laws may not be impaired, "either by subsequent legislation, or by the decisions of its courts altering their construction." The reference is, of course, to the statute law.

In *New Orleans Water-works Co. v. Louisiana etc. Co.*, 125 U. S. 18, the law on this subject is stated as follows: "In order to come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals. This court, therefore, has no jurisdiction to review a judgment of the highest court of a state on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed." "We are not authorized by the judiciary act," says Mr. Justice Miller, in *Knox v. Exchange Bank*, 12 Wall. 383, "to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." To bring the case within this provision of the federal constitution, it must be the constitution, or a statute, or some enactment that has the force of law, either of the state or of some municipality exercising legislative power delegated by the state, which impairs the obligations of a contract: *Williams v. Bruffy*, 96 U. S. 176-183; *United States v. New Orleans*, 98 U. S. 381-392; *Murray v. Charleston*, 96 U. S.

432-440; *Meriwether v. Garrett*, 102 U. S. 472. In the very recent case of *Lehigh Water Co. v. Easton*, 121 U. S. 388, Mr. Justice Harlan says: "The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold the contract void, which in our opinion is valid; it may adjudge the contract to be valid, which in our opinion is void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms, or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."

The affidavit, in our opinion, is insufficient, and the judgment was rightly entered.

Judgment affirmed.

SMILEY v. GAS COMPANY.

CLARK, J. The clause of forfeiture in this case would seem to apply, not to the half-yearly sums of \$250, but to the annual payments of \$500 to be made for gas rent of the well, or each of the wells, the product of which should be conducted off the farm for consumption within the period covered by the lease, which was "for two years, or so long thereafter as oil or gas is found in paying quantities," or to a failure to put down any well within two years. There was no time within two years in which the lessees were bound to put down a well under penalty of forfeiture; but for certain periods of delay within that time they were to pay certain sums of money, which in a certain event were to be credited upon the rent, when a well or wells were put down producing oil or gas in paying quantities. The last payment of \$250 was due on February 4, 1890, and the suit was brought March 14, 1890, whilst the two years did not expire until August 4th thereafter. The time for forfeiture, therefore, had not yet arrived. But if this were not so, the case is governed by our opinion filed in *Ray v. Western Penn. Natural Gas Co.*, 138 Pa. St. 576; *ante*, p. 922, filed at present term.

The judgment is affirmed.

AGERTER v. VANDERGRIFF.

CLARK, J. The principal question in this case, arising out of the clause of forfeiture contained in the lease, is decided in *Ray v. Western Penn. Natural Gas Co.*, 138 Pa. St. 576, *ante*, p. 922. We there held, following our own cases of *Galey v. Kellerman*, 123 Pa. St. 492, and *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222, that as this clause was inserted in the interest of the lessor, he had the option either to declare the forfeiture or to affirm the continuance of the contract, and if the lessor does not choose to avail himself of the forfeiture, it cannot be set up by the lessee as a defense to an action in affirmance of the lease.

The case differs from *Ray v. Western Penn. Natural Gas Co.*, 138 Pa. St. 576, *ante*, p. 922, in this, however, that Eva C. Agarter, the lessee at the time of the making and execution of the lease, was and still is a *feme covert*, being the lawful wife of Christopher D. Agarter, who joined her in the execution thereof; and it is contended that as the said lease was not acknowledged as required by law, it is null and void, and that the plaintiff, upon that ground, if not upon any other, was not entitled to judgment, for want of a sufficient affidavit of defense.

As the validity of the lease in question is not affected by any statute in force at the time the lease was made, the question is to be determined according to the principles of the common law. The contracts of a married woman, at the common law, were absolutely void, but they have been held valid when set up by her in her own behalf, and when she is not in default in performance on her part.

It has been held that she may take a lease; and if she in fact voluntarily performs all the stipulations on her part to be performed, the lessor will not be permitted to treat the lease as void, for this would be against equity and good conscience: *Baxter v. Smith*, 6 Binn. 427. She may take a conveyance in fee of lands to herself, and the fact that it is encumbered with a condition will not prevent its vesting: *Bortz v. Bortz*, 48 Pa. St. 382; 86 Am. Dec. 603. She may hold lands purchased under an executory agreement upon which she has paid the installments of purchase-money as they fell due, averring her readiness and willingness to pay the balance as it shall become due. Such a contract can be rescinded only on her refusal to perform the conditions: *Vance v. Nogle*, 70 Pa. St. 176. In *Walker v. Coover*, 65 Pa. St. 430, it was held that an assign-

ment of bonds to a married woman, as collateral security, upon her undertaking to pay certain debts of the assignor, was good notwithstanding her coverture, she having paid part of the debts and averred her readiness to pay the remainder.

It is not pretended that the plaintiff has not in all respects complied with her contract. She has not sought to avoid the instrument, nor has she interfered with the defendant, or in any way or manner prevented him from operating under the lease. On the contrary, she has respected his rights, has refrained from operating herself, or through others, and, still standing upon her contract, she demands that the defendant shall comply with his covenants. An affidavit of defense setting up coverture, under such circumstances, is insufficient: *Kahn v. Pickard*, 5 Week. Not. 537.

The judgment is affirmed.

MERTZ v. VANDERGRIFT.

CLARK, J. This case is in all respects governed by the principles set forth in our opinion in *Ray v. Western Penn. Natural Gas Co.*, 138 Pa. St. 576; *ante*, p. 922.

Judgment affirmed.

LANDLORD AND TENANT. — Where the tenant so acts as to work a forfeiture of his lease, the landlord may either treat him as a trespasser, and eject him without notice to quit, or elect to continue the lease and treat him as a tenant: *Duke v. Harper*, 6 Yerg. 280; 27 Am. Dec. 462, and note; *Garnhart v. Finney*, 40 Mo. 449; 93 Am. Dec. 303. And a surety for the payment of rent, in a lease conditioned to be void upon the non-payment thereof, remains bound, notwithstanding a breach of the condition, if the landlord waives the forfeiture: *Clark v. Jones*, 1 Denio, 516; 43 Am. Dec. 706, and note.

MARRIED WOMEN, CONTRACTS OF. — A contract with a married woman is binding upon the opposite party, where she has paid the consideration or performed her part of the agreement: *Ham v. Boody*, 20 N. H. 411; 51 Am. Dec. 235.

ESTATE OF WOODBURN.

[186 PENNSYLVANIA STATE, 606.]

ESTATES OF DECEDENTS — ELECTION BY WIDOW IN IGNORANCE OF FACTS NOT BINDING. — Under a statute allowing the widow to take under her husband's will, or to elect to repudiate it and take under the intestate law, an election by her to take under the will, made in ignorance of the facts, and of her rights and of the relative values of the properties between which she may choose, is not binding upon her, especially if made shortly after her husband's death.

ESTATES OF DECEDENTS — INCOME, WHEN PASSES TO TENANT FOR LIFE. — Where a testator has made a lease of his land for oil purposes prior to his death, under a lease providing that he shall receive a definite portion of the oil produced, and in his will has bequeathed the income of his estate to tenants for life, his share of the oil produced after his death is income, to which the tenants for life are entitled as such.

PETITION by executors for the distribution of the proceeds of the sale of the estate of Samuel Woodburn, who died in April, 1889, leaving a will, by which he bequeathed the use of a one-third interest in his estate, both real and personal, to be paid yearly to his wife, Mary Woodburn. The use of the remaining two thirds of such estate he bequeathed to his five children or their heirs, during the lifetime of his wife, to be paid yearly to their guardian, or on "maturity" (majority?) to each one individually, and on the death of the wife the property to be equally divided between the five children or their heirs. On April 29, 1889, the testator's widow filed a writing under seal, at the request of the executors, by which she elected to take under the will. Shortly thereafter she repudiated this election, on the ground that it was made in ignorance of the facts and of her rights. The court below decided that the widow was not bound by her election to take under the will, but was entitled to take under the intestate laws; and the executors appeal. The remaining facts are stated in the opinion.

T. J. Duncan and John Aiken, for the appellants.

T. F. Birch and J. L. Judson, for the appellee.

PAXSON, C. J. This record presents two questions, which may be briefly stated thus: (a) Was the widow of Samuel Woodburn, deceased, bound by her first election to take under the will? and (b) whether the oil produced from the testator's real estate was a part of the *corpus* of the estate.

In regard to the first question, the auditor has found that the widow signed the paper electing to take under the will in

ignorance of her rights; that in doing so she was ignorantly assenting to what she did not comprehend, to what had never been explained to her; that is, the effect and purpose of the paper. He says: "The executor, shortly after the testator's death, called upon the widow with the paper showing her acceptance of the terms of the will, but does not think he made any explanation of her rights under the will or under the law. He told her what it was for, and she signed it. He further says that at that time he believed she took the same one third under the will that she was entitled to under the intestate law. She says the executor explained to her that it was something relating to Mr. Woodburn's will; that he did not persuade her to sign that first paper; he just said it was a paper connected with the estate. The auditor believed that if she got any impression at all from the executor, it must have been that she was signing a paper which was to give her the same one third she would have taken under the intestate law."

The law upon this point is settled. While there is no allegation that the widow was intentionally deceived or misled, yet the fact remains that she signed the paper in ignorance of her rights, without any attempt on the part of the executor to inform her of them, or of the effect of the paper to which he procured her signature. Indeed, he appears to have been ignorant upon the subject himself. The authorities are clear that nothing less than unequivocal acts will prove an election, and they must be done with a knowledge of the party's rights, as well as of the circumstances of the case. Nothing less than an act intelligently done will be sufficient. She should know, and if she does not, she should be informed, of the relative values of the properties between which she was empowered to choose; in other words, her election must be made with a full knowledge of the facts. The rule applies with especial force where the widow is called upon, as in this case, to make her election shortly after her husband's death: *Anderson's Appeal*, 36 Pa. St. 492; *Cox v. Rogers*, 77 Pa. St. 167; *Bierer's Appeal*, 92 Pa. St. 266.

In regard to the second question, the auditor has found that the testator, prior to his death, had leased his farm for oil purposes. The lessee was to pay \$500 in cash, and \$6,750 within sixty days from the date of the lease, and one eighth of all the oil produced. The lessee entered under the terms of this lease, and at the time of the testator's death there were three pro-

ducing wells upon the premises, and a fourth well was being drilled. This last well was producing at the date of the first meeting of the auditor. The oil in the pipe-lines to the credit of the testator at the time of his death was sold by his executors for \$697.57. No question arises as to this money. It was clearly a part of the *corpus* of the estate. The oil run into the pipe-lines since testator's death was sold by the executors for \$2,463.77. We are of opinion that this was a part of the income of the estate. It was so held by the auditor and the court below, and we think correctly. The right of a life tenant to operate previously opened mines, and work the same even to exhaustion, cannot be questioned: *Eley's Appeal*, 103 Pa. St. 303, and cases there cited.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

WIDOW, ELECTION OF, TO TAKE UNDER THE PROVISIONS OF HUSBAND'S WILL. — A widow who has elected to take under the provisions of her husband's will is estopped to assert claims against the estate inconsistent therewith: *Note to Shivers v. Simmons*, 28 Am. Rep. 376, 377. But when she makes such election in ignorance of her rights, she is not bound thereby: *Note to Black v. Ward*, 15 Am. Rep. 176, 177; *Adsit v. Adsit*, 2 Johns. Ch. 448; 7 Am. Dec. 539. But an election once made, and affirmed by bringing suit, will not be set aside on the ground of mistake, except upon strong and clear proof: *Hall's Case*, 11 Bland Ch. 203; 17 Am. Dec. 275.

INCOME, TO WHOM BELONGS. — As to who is entitled to the income and profits of corporate stock as between the life tenant and remainderman, see *Kuntleman's Estate*, 136 Pa. St. 142; 20 Am. St. Rep. 909, and note; *Gibbons v. Mahon*, 4 Mackey, 130; 54 Am. Rep. 262, and note 264-269. The tenant for life has the right to the profits obtained from working mines already opened on the land before the commencement of his life estate: *Lynn's Appeal*, 31 Pa. St. 44; 72 Am. Dec. 721. See also *Stonebraker v. Zollicoffer*, 57 Md. 154; 36 Am. Rep. 364.

INDEX TO THE NOTES.

- ADVANCEMENT**, what is, and how proved, 296.
- AFFINITY** defined, 797.
- AMENDMENT** of proof of service of process, 57.
- ASSIGNMENT**, equitable, what is, 899.
- ATTORNEYS**, contract of, to share fees is void, 26.
undue influence over client, presumption of, 95.
- CHATTEL MORTGAGES**, delay in filing for record, 232.
recording, actual notice is equivalent to, 232.
recording, effect of, 282, 283.
recording, necessity of, 282.
recording, when complete, 282.
- CIVIL RIGHTS**, discrimination against persons because of color, 584.
- CONSTITUTIONAL LAW**, classification of subjects of legislation is permissible, 782.
general and special laws, what are, within meaning of constitutional prohibition, 780-789.
general law is one operating in all parts of the state under the same circumstances, 781.
general law may classify subjects of, 782.
general law, statute which embraces all of a class of persons in like circumstances is, 781.
municipal corporations, statute applicable to one only, when valid, 785-789.
municipal corporation, statutes applying to one class of, when valid, 784.
provision declaring that laws of general nature shall have uniform operation, construction of, 781.
provisions forbidding special legislation are mandatory, 780.
provisions forbidding special legislation, whether statute violates, when a judicial question, 780.
special law, statute relating to particular things and persons out of a class is, 781, 782.
special legislation, instances of invalid, 788, 789.
statutes classifying municipal corporations, 783, 784.
statutes general in form, but which can never apply to but one county or municipality, 782.
substance, and not mere form, of the statute must be considered, 781.
uniform operation of laws distinguished from universal, 781.
- CORPORATION**, deed executed by president, when his personal act, 241.
ultra vires, estoppel against urging defense of, 913.
repeal or modification of charter and franchises of, 148.
- CO-TENANTS**, conveyance by one in severalty, effect of, 474.
grant by one, of the right to take water from the common lands is void, 594, 595.

COVENANTS RESTRICTING USE OF LAND, absence of statement that restriction is for the benefit of land retained, 489.

changes in condition of property when justifies refusal to enforce, 498.

condition of forfeiture, equity will enforce, notwithstanding condition, 485.

damage for violation not essential to right to enforce, 501.

equity will enforce in favor of original owner, 485.

equity will enforce in favor of owner of any lot into which the tract is divided, 485.

equity will enforce, notwithstanding condition of forfeiture, 485.

estoppel to enforce, 495-496.

forfeiture for breach of condition, equity will not enforce, 485.

form of, is immaterial, 487.

injunction, mandatory, to compel destruction of buildings erected in violation of, 500.

injunction to restrain breach of, 486.

intended for benefit of land retained cannot be released by original covenantee, 495.

intent in making, whether inferable from other conveyances, 499.

intent in making, whether inferable from situation of land, 499.

intent of parties in making, whether must be inferred solely from the deed, 499.

joinder of parties in bill to enforce, 500.

made by vendor are taken most strongly against him, 493.

need not run with the land, to entitle successor in interest to enforce, 487.

not made for benefit of land are enforceable only by parties thereto, 492.

not to build within certain distance of the street, erection of bay-windows, whether violates, 494.

not to erect building on rear of lot, construction of, 494, 495.

notice of fact of covenant and of effect of, distinction between, 491.

notice of restriction, from what inferred, 491.

perpetual servitude, when created by, 484, 485.

personal agreement is enforceable against purchasers with notice, 487.

presumption that covenant is for benefit of land, 489, 491.

refusal of equity to enforce because of changes in condition of lands, 496.

refusal to enforce because not intended for benefit of land, 502-508.

release of, by original covenantee, when inoperative, 495.

restriction upon use of land, right to make and enforce, 485.

restriction upon use of land may be by condition, covenant, reservation, or exception, 485.

restriction, when presumed to be for benefit of land retained, 489, 491.

restrictive agreement not inserted in deed, whether enforceable, 489.

statement that restriction is for the benefit of land retained, whether essential, 489.

separate grantees of covenantee, each is entitled to benefit of, 500.

specific performance of, when may be decreed, 485.

successors in title, when bound by, 486.

CRIMINAL LAW, arrest, homicide in resisting, 187.

assault with intent to murder, essentials of crime of, 155.

false pretenses, obtaining money or goods by, 265.

intent to kill, from what inferred, 399.

intent or motive of accused, when he may testify to, 318.

- CRIMINAL LAW**, malice is essential to murder, 399.
 malice presumed from use of deadly weapon, 399.
 murder, instructions as to different degrees of, 187.
 murder, instructions to jury upon trial for, what are necessary, 355.
 murder, threats of deceased against defendant, when admissible, 355.
- DAMAGES**, measure of, agreements, whether may control, 122.
 measure of, for breach of contract, 121.
- DEFINITION** of affinity, 797.
 of consanguinity, 797.
 of general and special laws, 780, 781.
 of malice, 546.
 of probable cause, 546.
 of *res gestæ*, 178.
- DENTISTS**, statutes regulating, 310.
- DIVORCE**, adultery of plaintiff as a defense, 286.
 adultery, proof of, 286.
 void because parties are non-residents, 219.
- EASEMENT**, tenant in common cannot create, 594, 595
- EVIDENCE**, belief of a party may be proved by himself, 314.
 declarations of deceased persons, when admissible, 433.
 declarations, when admissible, 178.
 good faith or understanding of a party may be testified to by himself, 314.
 motive or intent, party may testify to, 314.
 of good faith of purchaser, 316.
 of intent of party in doing act claimed to be criminal, 318.
 of intent of party in making a contract, 317.
 of intent of party in making or accepting a transfer, 316.
 of intent of party in prosecuting another, 316.
 of intent respecting dedication of land, 317.
 of intent with which act was done, 317.
 of previous accidents, whether admissible to show negligence, 332.
 res gestæ, what are, 178.
- EXECUTION**, exemption of property of citizens of another state, 152.
 garnishment of debt in one state exempt by the laws of another, 152.
 See **REDEMPTION**.
- FENCES**, malicious erection of high, whether may be enjoined, 512.
- FIDUCIARY RELATIONS**, undue influence presumed from, 101.
- GUARDIAN**, undue influence over ward, when presumed, 101.
- HOMESTEAD**, excess over amount allowed, execution sale of, 30.
 partition of, will not be ordered, 29.
 survivor's right in, 29.
- HUSBAND**, undue influence over wife, whether presumed, 102.
- INSURANCE**, bailee has an insurable interest, 720.
 oral agreement for, 883.
 premium, payment of, not essential to, 883.
- INTENT**, party may testify to his, 314-319.
 party's testimony as to his, not conclusive, 315.
 prosecution, party may testify to his intent in, 316.
- JOINT DEBTORS**, release of one, when releases the other, 715.

- JUDGMENTS**, jurisdiction, whether depends on fact of service of process or upon the proof of such service, 56.
 service of process, proof of, whether may be amended, 56, 57.
- JURISDICTION**, *ad damnum* clause, amendments of, 621, 622.
ad damnum clause in complaint, whether determines, 618.
 allegation of complaint, whether controls, 618.
 amount in controversy being in excess of jurisdiction, case must be dismissed, 620.
 amount in controversy, error respecting, will not divest jurisdiction, 620.
 amount in controversy, fraudulent statement of, 619.
 amount in controversy, how determined, 618-621.
 amount in controversy in action on bond is the sum claimed, not the penalty of the bond, 619.
 amount in controversy in attachment proceedings not determined by value of property attached, 619.
 amount in controversy is deemed to be the principal sum, exclusive of interest, 620.
 amount in controversy is the aggregate of several distinct items, 619.
 amount in controversy is the damages claimed, not those suffered, 619.
 amount in controversy, reducing, to bring the claim within jurisdiction, 620.
 set-off in excess of, 621.
 splitting entire transaction or account to give, 621.
 voluntarily remitting part of claim to bring case within, 621.
- LANDLORD AND TENANT**, covenant against assigning, partial waiver of, 588.
 covenant against assigning, waiver of, removes restriction forever, 588.
 covenant restricting use of premises to specified purposes, 588.
- LIBEL**, commercial agencies, publications of, when not privileged, 524.
- MALICIOUS PROSECUTION**, what essential to maintain action for, 546.
- MARRIED WOMEN**, executory contracts of, are void, 83.
- MERCER**, change in form of action does not avoid, 216.
- MORTGAGE** to secure payment of several notes, proceeds of sale, how to be applied, 604.
- MUNICIPAL CORPORATIONS**, delegation of powers to, by the legislature, 373.
 gift of a fund for support of the poor of, is invalid, 753-758.
 liability of, for neglects of their officers, servants, or agents, 469.
 power of, to borrow money, 373.
- NEGOTIABLE INSTRUMENTS**, recital of consideration, whether affects indorsee with notice of its failure, 516.
- NOTARY PUBLIC**, sureties on bond of, when answerable for his negligence, 413.
- NUISANCE**, cause of action for, when accrues, 426.
 lapse of time will not legalize, 426.
- PERPETUITY**, bequest of a fund to be kept for the support of the poor of a town is, 754.
- PRESUMPTION** of undue influence against one made a legatee to the exclusion of heirs, 95, 96.
 of undue influence against priests, attorneys, and religious advisers, 95.
 of undue influence arising from confidential relation of testator and legatee, 94.

- PRIESTS**, undue influence of, when presumed, 95.
- PROMISSORY NOTE**, payee, name of, may be in blank, 436.
what constitutes, 436.
- RAILWAY CORPORATIONS**, public obligations of, cannot be escaped, 179.
- RAILWAYS**, depot grounds, whether must be inclosed, 289.
fences and cattle-guards, duty to maintain, 289.
sleeping-car companies, liability of, 647.
- REDEMPTION** from foreclosure sales, 245-247.
from foreclosure sales, heirs of deceased mortgagor may redeem, 243.
from execution sales, assignee of an equity of redemption may redeem, 247.
by dowress, 243.
creditors without a lien may not redeem, 245.
defendant may redeem, though he retains no interest, 244.
equity will not aid one who has failed to exercise his right in time, 244.
grantee of defendant, effect of redemption by, 244.
grantee of judgment debtor may redeem, 244.
judgment creditor cannot redeem from sale made to pay his claim and others, 245.
judgment creditor of a mortgagor may redeem, 247.
judgment creditor, when may redeem, 245.
junior mortgagees may redeem from sale made under senior mortgage, 247.
mortgagees cannot redeem from junior mortgage, 246.
mortgagor may redeem, though he had no title to the mortgaged premises, 246.
mortgagor's assignee may redeem, 246.
remaindermen may redeem, 243.
right of, can only be exercised by one for whose protection it is necessary, 246.
strangers may not redeem, 245.
strict compliance with statute is essential to, 249.
tenant in common, right of, to redeem, 248.
trustees of absent debtor may redeem, 245.
tenant for life or for years may redeem, 243.
- RELEASE** of one of several joint debtors, 715.
- SLANDER**, words actionable *per se*, instances of, 305.
- SPIRITUAL ADVISER**, undue influence of, when presumed, 95.
- STATUTE OF LIMITATIONS**, absence from state, exception of, whether applies to one never within state, 810.
absence from state, temporary, whether suspends, 810.
absence from state when cause of action accrues, 809.
amendment of complaint after action is barred by, 344.
- STATUTES** are special which apply only to a number of individuals selected out of a class to which they belong, 780.
general and special, distinction between, 780.
general, defined, 780.
invalid, because violating constitutional prohibition against local or special laws, 780-789.
special, statute suspended in one locality, when is, 780, 781.
- TRUSTS**, defined, beneficiary is essential to validity of, 755.

- UNDUE INFLUENCE**, attorney presumed to exercise, over client, 102.
 brother presumed to exercise, over sister, 103.
 child presumed to exercise, over parent, 102.
 guardian presumed to exercise, over ward, 101.
 husband presumed to exercise, over wife, 102.
 instances of, 103, 104.
 medium presumed to exercise, over believer in spiritualism, 103.
 parent presumed to exercise, over child, 102.
 presumption of, against attorney, 95.
 presumption of, against guardian of feeble-minded person, 96.
 presumption of, against priest or spiritual adviser, 95.
 presumption of, against spiritualistic medium, 95.
 presumption of, from business or social relations, 97.
 presumption of, from confidential relations, 94.
 presumption of, from disinheritance children, 96.
 presumption of, from relation of guardian and ward, 95.
 solicitation and importunities, when are not, 99.
 trustee presumed to exercise, over *cestui que trust*, 101.
- WILL**, bequest for benefit of the poor of a town is void for uncertainty, 753.
 fiduciary relations, presumption of undue influence arising from, 101.
 husband's influence over testator, when lawful, 98.
 illicit relations influencing, 100.
 revocation of, by marriage, 329.
 solicitation and importunity, when do not amount to undue influence, 99.
 undue influence arising from relation of guardian and ward, 95.
 undue influence, inequality and injustice, when give rise to, 99.
 undue influence, instances of, 101-104.
 undue influence, not exerted by beneficiary, 99, 100.
 undue influence, presumption of, against attorney, 95.
 undue influence, presumption of, against priest, 95.
 undue influence, presumption of, against spiritualistic medium, 95.
 undue influence, presumption of, business or social relations do not give rise to, 97.
 undue influence, presumption of, family relations do not give rise to, 97.
 undue influence, presumption of, from bequest to, conclusive, 100.
 undue influence, presumption of, from testator's being kept away from heirs whom he disinherited, 96, 97.
 undue influence, presumption of, from will being written by or at request of beneficiary, 96, 97.
 undue influence, wife or husband's importunities, when are not, 98, 99.
 undue influence, presumption of, arising from confidential relations, 94.
 undue influence, presumption of, from unnatural disposition of property, 96.
 wife's influence over testator, when lawful, 98.
- WITNESS**, intent, motive, or belief of, may be proved by himself, 314-319.

INDEX.

ABATEMENT.

1. **PLEA OF FORMER ACTION PENDING, WHAT NECESSARY TO SUSTAIN.** — To sustain a plea of former action pending, it must appear from the pleadings in the first action that it was for the same cause as the second, or necessarily involved the same question. It is not enough that the same property is in controversy in both actions. *Mandeville v. Avery*, 678.
2. **IGNORANCE OF CAUSE OF ABATEMENT** will never justify the filing of a plea in abatement after the time limited has expired. *Huntley v. Holt*, 71.
See EXECUTORS AND ADMINISTRATORS, 4; INSURANCE, 27.

ACTIONS.

1. **SUFFICIENCY OF COMPLAINT.** — For every malicious wrong there is a remedy, and under the prevailing liberal system of pleading, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named. *Antcliff v. June*, 533.
2. **NON-RESIDENCE WAIVER OF WANT OF JURISDICTION.** — Objection to the jurisdiction of the court on the ground of the non-residence of the defendant corporation may be and is waived by appearing and answering without at the same time filing or presenting this objection to the jurisdiction. *Macon etc. R. R. Co. v. Gibson*, 135.
2. **SUFFICIENCY OF COMPLAINT.** — A declaration which fully sets out a conspiracy between the defendants to defraud the plaintiff, and the fact that he was defrauded out of his money paid upon a void judgment obtained by them through fraud, clearly sets out an actionable wrong, and one that can be recovered for in an action upon the case, no matter what it is named or called. *Antcliff v. June*, 533.

See CO-TENANCY, 1; HUSBAND AND WIFE, 1; STATES, 1, 2.

ADULTERY.

See MARRIAGE AND DIVORCE, 1-4.

ADVANCEMENT.

See EVIDENCE, 14.

AGENCY.

1. **LIABILITY OF PRINCIPAL.** — One dealing with an authorized agent is bound to inquire and ascertain the extent of his authority. A principal is

bound by all acts of the agent within the scope of his authority. *Burk v. Wilcox*, 563.

2. **IF A PRINCIPAL ADOPTS THE CONTRACT OF A SELF-CONSTITUTED AGENT** who has assumed to act for him without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf. He is bound by all acts within the scope of the assumed authority of such agent. His liability extends to the frauds and misrepresentations of the agent committed or made while acting within the scope of the real or assumed authority. *Id.*
 3. **LIABILITY OF AGENT ON UNAUTHORIZED CONTRACT.**—A letter written by the cashier of a national bank on the letter-head of his bank, to a bank in another state, to the effect that if the latter bank will sign a replevin bond for customers of the writer's bank, "we will stand between you and all harm," and signed by the writer as "cashier," constitutes an agreement, when acted upon, into which a national bank cannot legally enter, and binds the writer personally, in the absence of clear and unequivocal proof that he was claiming to act for his bank, and did not intend to bind himself. *Knickerbocker v. Wilcox*, 595.
 4. **PERSONAL LIABILITY OF AGENT ON UNAUTHORIZED CONTRACT—MEASURE OF DAMAGES.**—A person who, without having in fact authority to make a contract as agent, yet does so under the *bona fide* belief that such authority is vested in him, is nevertheless personally responsible to those who contract with him in ignorance of his want of authority, and the measure of damages is the loss sustained by reason of not having the valid contract which the agent undertook to execute. *Farmers' Co-operative Trust Co. v. Floyd*, 846.
 5. **EVIDENCE—ORDER TO PROVE DECLARATIONS OF AGENT—WHAT MUST CONTAIN.**—A party offering to prove the declarations of an alleged agent must first show that the agency exists, and state the substance of the declarations, that the court may judge of their relevancy. *Long v. North British etc. Ins. Co.*, 879.
- See CHATTEL MORTGAGES, 3, 5; CORPORATIONS, 5, 6, 12-15, CRIMINAL LAW, 6; EVIDENCE, 6; INSURANCE; JUDGMENTS AND DECREES, 14; TELEGRAPH COMPANIES, 4.

ALIMONY.

See MARRIAGE AND DIVORCE, 7.

ALLUVION.

See DEEDS, 9, 10.

ANIMALS.

LIABILITY FOR DAMAGE DONE BY CATTLE UNLAWFULLY IN HIGHWAY.—One who turns his cattle loose into a highway, leaving them unattended, in violation of a statute, assumes all the risks of such action, and is liable for damage done by them in overturning a sulky lawfully in the highway. *Shipley v. Colclough*, 546.

See RAILROAD COMPANIES, 11.

APPEARANCE.

See ACTIONS, 2; PROCESS, 6.

APPEAL AND ERROR.

1. RELIEF FROM AN ERRONEOUS ORDER OF A COURT DISTRIBUTING AN ESTATE of a decedent must be sought by an appeal, and cannot be obtained by a bill in equity, to restrain compliance therewith. *Duly v. Pennk*, 61.
2. ERRORS ASSIGNED ON REFUSAL OF INSTRUCTIONS REQUESTED ARE NOT AVAILABLE when the record fails to show that all the instructions given are preserved in the record. *Winston v. Burnell*, 289.
3. EVIDENCE WILL NOT BE REVIEWED to determine whether or not it is sufficient to sustain a verdict and judgment, when the case made contains no statement that it embraces all the evidence given at the trial, and the statement upon that subject in the certificate of the trial judge attached to the case made is not sufficient. *Id.*
4. INSUFFICIENCY OF EVIDENCE. — The appellate court will not revise the refusal of the lower court to grant a motion for a new trial, based solely on an alleged deficiency of evidence to make out the case. *State v. Deschamps*, 392.
5. ORDER SETTING ASIDE DEFAULT AND A JUDGMENT THEREON, supported by an affidavit of merits, will not be interfered with by an appellate court, unless it was made without jurisdiction or is an abuse of discretion. *Reinhart v. Lugo*, 52.

ARREST.

See CRIMINAL LAW, 16, 17.

ARTESIAN WELLS.

See WATERS, 1.

ASSAULT.

See CRIMINAL LAW, 5.

ASSIGNMENT.

1. CONTRACT, ASSIGNABILITY OF. — A CONTRACT WHEREBY ONE PERSON AGREES TO BUY AND ANOTHER TO SELL a crop of apricots which the former shall raise during certain specified years, though not negotiable, is transferable, under the Civil Code of California, by indorsement. The indorsement and transfer by a purchaser cannot compel the vendor to accept the transferee nor to release the original purchaser, but the purchaser on accepting the fruit from the vendor may require the assignee in turn to accept it from him and to pay him the contract price therefor. *Cutting P. Co. v. Packers' Exchange*, 63.
2. ASSIGNEE'S LIABILITY. — If a contract for the purchase of property is assigned by the vendee, but the vendor refuses to accept the assignee as his debtor or to release the original vendee, the assignment nevertheless transfers to the assignee the duty to receive the property from his assignor, and to make payment therefor according to the terms of the original contract of sale, and failing to do so, he is answerable in damages to his assignor, who must be regarded as being his surety and as having received and paid for the property in that capacity. *Id.*
2. AN ORDER BY A CREDITOR directing his debtor to pay a third person a certain sum of money left with the debtor, or its officers, does not

amount to an assignment of any part of the debt, and the debt may therefore be thereafter attached or subjected to trustee's process, where the amount of such order is less than the amount due from the debtor to the creditor. *Holbrook v. Payne*, 466.

4. UNDIVIDED PART OF DEMAND MAY BE SOLD AND TRANSFERRED; and if all the owners of the demand unite in a suit upon it, the fact of the assignment of a part constitutes no defense. Where, in an action on a joint claim against two defendants, one only of whom defends, a decision is given in favor of the plaintiff, only one roll is filed, but separate judgments are entered against the defendants, that against the one who defended being greater than that against the other by the amount of the costs and interest, the judgments cannot be considered as joint, and a release of one of them will not, in the absence of any claim of payment by either of them, affect the right of the judgment creditor against the other. *Whittenore v. Judd etc. Oil Co.*, 708.
5. EQUITABLE ASSIGNMENT WITH VESTED INTEREST, WHAT CONSTITUTES. — A power of attorney executed by a tenant in common of land in process of partition, authorizing his sister to take possession of, lease, or sell an l convey his interest in the land, accompanied by a letter authorizing her to collect the proceeds of the sale of his interest in the land, and to appropriate so much thereof as might be necessary to pay a debt of \$250 borrowed from her, operates as an equitable assignment of a vested interest in so much of the brother's estate as is necessary to pay the indebtedness named in the letter, and such interest is not divested by the subsequent death of the brother. *Estate of Keys*, 896.

See NEGOTIABLE INSTRUMENTS, 13.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. FRAUD—PREFERENCES. — An assignment for the benefit of creditors, when fully perfected, cannot be set aside at the suit of an attachment or execution creditor by proof of unlawful preferences or of any fraud in the matter of such assignment. *Wolf v. Slosson*, 613.
2. ASSIGNEE FOR BENEFIT OF CREDITORS BOUND TO EXECUTE ASSIGNMENT UNTIL AVOIDED. — An assignment for the benefit of creditors in due form, being valid as between the parties, and if fraudulent as to creditors, only voidable by adjudication, at their election, or that of some one of them, must, until an attack is made with a view to such a judicial determination, be treated as valid, and its directions be executed by the assignee. *Knower v. Central Nat. Bank*, 700.
3. PAYMENT BY ASSIGNEE FOR BENEFIT OF CREDITORS TO CREDITOR VESTS TITLE IN LATTER, THOUGH ASSIGNMENT SUBSEQUENTLY AVOIDED. — A payment made by an assignee for the benefit of creditors to a creditor of the assignor of the amount of the debt due him, pursuant to the directions in the assignment, before any lien is obtained upon the fund, is effectual to vest in such creditor title to the money so paid, although the assignment be, in an action subsequently commenced, adjudged fraudulent and void as against the creditors of the assignor. And the mere fact of knowledge on the part of the creditor so paid of the intent of the debtor to defraud his other creditors does not prejudice his right to seek and obtain payment. *Id.*

See JUDGMENTS, 11; PARTNERSHIP, 6.

ATTACHMENT AND GARNISHMENT.

1. **UNDERTAKING — LIABILITY OF SURETIES.** — The undertaking given by defendant in attachment takes the place of the attachment proceeding and of the property seized under the writ, and the sureties in the undertaking are bound to the amount thereof, the same as the property of the defendant or the garnishee would have been bound if no undertaking had been given. *Jaynes v. Platt*, 810.
2. **JUDGMENT CONCLUSIVE AGAINST SURETIES IN UNDERTAKING BOND.** — In an action upon an undertaking bond in attachment to recover the amount of a judgment against defendant in attachment, the sureties in the undertaking are bound by such judgment, and, in the absence of fraud, collusion, or clear mistake, cannot question its correctness, or the action of the court at any step in the proceeding up to and including the rendition of final judgment. *Id.*
3. **JUDGMENT IN ATTACHMENT, PRESUMPTIONS IN FAVOR OF, AS AGAINST SURETIES IN UNDERTAKING BOND.** — Where, in an action upon an undertaking in attachment to recover of the sureties therein the amount of a judgment against the defendant in attachment, it appears that prior to the rendition of such judgment an amended petition was filed and answered, it will be presumed that the court, in passing upon the application for leave to file the amended petition, ascertained and found that the claim declared upon therein, though stated in different form, was based upon the same facts and transactions as the claim stated in the original petition; and an answer in the action on the undertaking, stating the facts, and alleging non-liability on the ground that the action in which the judgment was rendered was a different action from that in which the undertaking was given, does not present a defense. *Id.*
4. **GARNISHMENT OF WAGES IN FOREIGN STATE.** — An attorney who is the holder by assignment of a claim by a creditor against his debtor may garnish the wages due such debtor, in another state than that in which the parties reside, and thus compel payment without becoming liable in damages, although the object of the proceeding is to evade the law of the state where the parties reside, which exempts such wages from garnishment. *Harwell v. Sharp*, 149.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

ATTORNEY AND CLIENT.

ATTORNEY'S CONTRACT TO DIVIDE FEES, WHETHER AGAINST PUBLIC POLICY.

— An agreement between an attorney and counselor at law, and a third person, who is neither, that if the latter will procure the employment of the former by a certain litigant he shall be entitled to one third of such compensation as the attorney may receive from such employment, is contrary to public policy and void, and will not support an action against the attorney to recover part of the compensation by him received. *Alpers v. Hunt*, 17.

See ASSIGNMENT, 3.

BAILMENTS.

See CARRIERS; HUSBAND AND WIFE, 1; SALES, 1.

BANKS AND BANKING.

1. **FORGED CHECKS.** — If a bank, in the ordinary course of its business, pays a check purporting to be signed by one of its depositors to one

who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signatures of its own customers, and therefore is not entitled to the benefit of the rule which, in cases of forgery, permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which a fraud has been effected. *First Nat. Bank v. First Nat. Bank*, 450.

2. *Id.* — If a bank pays a forged check to one who took it under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the drawee, or induce him to pay the check without the usual security against fraud, it is entitled to recover of him the amount of such payment. *Id.*

3. *Id.* — WHO MUST BEAR LOSS OF PAYMENT OF. — Where a loss which must be borne by one of two parties alike innocent of a forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even though innocent of any intentional fraud, through whose means it has succeeded. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened, and that he was not lulled into false security by any disregard of duty on his own part, or by the failure of any precaution which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had a right to believe that he had taken. *Id.*

4. *Id.* — If a bank negligently pays a forged check without inquiry as to its genuineness, or of the identity of the person presenting it, and then transmits it to the bank on which it was drawn, and is credited with the amount thereof by the latter, which retains the check for a couple of months, when it ascertains that the check, though purporting to be drawn by one of its customers, is a forgery, it may recover the amount thereof of the bank which had so transmitted it and received credit therefor. The bank on which the check purported to be drawn had a right to believe that the bank which cashed it had, before doing so, made the usual and proper investigation regarding its validity. The negligence of the bank on which it was drawn in discovering the forgery will not prevent its recovery, where such negligence has not prejudiced the bank negligently paying the check in the first instance. *Id.*

5. *BANK MAY PAY PROMISSORY NOTE OF ITS DEPOSITOR WHEN.* — Where a promissory note, negotiable and payable at a bank, is sent to said bank properly indorsed for collection, it has the right to pay the note out of any general funds of the maker on deposit with it, and charge his account with the amount. One who has drawn such a note cannot be heard to say, after his banker has paid a just debt for which he had given a note, to which the maker claims no defense, that the payment was wholly voluntary and unauthorized. In such a case, the banker who has paid the note is entitled to hold it as the equitable owner or purchaser, and is entitled to set it off in a suit to recover a balance due the depositor on general account. *Bedford Bank v. Acorn*, 258.

6. *BANK AS HOLDER OF NOTE OF DEPOSITOR — DISCHARGE OF INDORSER.* — Where a bank is the holder of a note payable at the bank, and upon

its maturity the maker has a cash deposit in bank sufficient to pay it, not specially applicable to a particular purpose, the bank is bound to charge the amount of the note against the deposit. The note is, in effect, a draft on the bank in favor of the holder and in discharge of the indorser, notwithstanding a notice by the maker to the bank not to apply the deposit on the note, and an agreement by the bank, before maturity, not to charge the note against the deposit. *German Nat. Bank v. Ferman*, 908.

7. **NOTE IN HANDS OF BANK—RIGHT OF DEPOSITOR.**—Where a depositor has made a special application or appropriation of his balance in bank, and has so notified it, it cannot charge off his note coming into its hands against his deposit upon maturity of the former. *Id.*

See AGENCY, 3; GIFT, 2.

BILLS OF EXCHANGE

See NEGOTIABLE INSTRUMENTS, 1-5.

BONDS.

See ATTACHMENT AND GARNISHMENT, 1-3; EVIDENCE, 8; HUSBAND AND WIFE, 13; SURETYSHIP, 3.

BURDEN OF PROOF.

See CRIMINAL LAW, 21; TRIAL, 12; WILLS, 19.

CARRIERS.

1. **CARRIER'S LIABILITY FOR PICTURES AND OTHER ARTICLES.**—Section 4281 of the Revised Statutes of the United States, providing that if any shipper of certain articles, among which are included pictures, shall load the same as freight or baggage on any vessel, without giving notice of their true character and value, and having the same entered on a bill of lading, the master or owner of such vessel shall not be liable as carrier thereof, in any form or manner, does not relieve the vessel or its owners from all liability for a package of portraits contained in a box received by the vessel for transportation, without any notice being given of its character or value. The statute merely relieves the vessel and its owners as common carriers, without abridging their liability as bailees. *Wheeler v. Oceanic Steam Nav. Co.*, 729.
2. **EVIDENCE OF NEGLIGENCE.**—NON-DELIVERY at port of destination is presumptive evidence of negligence. *Id.*
3. **RIGHT TO EJECT DRUNKEN AND DISORDERLY PASSENGER.**—Where the conduct of an intoxicated passenger, too drunk to take care of himself, is so violent or indecent as to excite alarm, or insult other passengers, or if he interferes with the management of the train by pulling the bell-rope, or otherwise, or threatens, with an opened knife, to take the life or do bodily harm to the conductor, or attempts to deter or intimidate him while in the performance of his duties, he has the right to put him off the train at night and between stations, using no more force than is reasonably necessary for the purpose, and putting him off the track out of the way of that train. The company is not then liable if such passenger subsequently goes upon the track, and is run over and killed by another train belonging to it. *Louisville etc. R. R. Co. v. Logan*, 332.

4. COMPLIANCE WITH CONDITION OF EXCURSION TICKET NECESSARY TO RIGHT TO TRANSPORTATION. — A round-trip excursion ticket, sold by a railroad at less than the regular rate from one place to another, and conditioned that to be good for return passage it must be signed by the purchaser and stamped and dated by the ticket agent at the latter place, is reasonable and valid. The purchaser of such ticket is not entitled to return passage thereon until he has complied with the conditions named therein; and for a failure to so comply, he may be lawfully expelled from the train, without unnecessary force, upon a refusal to pay his fare, without an investigation on the part of the conductor as to whom the ticket is presented as to his identity. *Edwards v. Lake Shore etc. Ry Co.*, 357.
5. MONEY IN CLOTHING OF PASSENGER IN SLEEPING-CAR NOT IN CUSTODY OF COMPANY. — Money in the clothing of a passenger in a sleeping-car, worn during the day, and placed under his pillow at night, cannot be considered as in the custody of the railway company, and it will not be liable for the loss of such money without some evidence of negligence on its part. *Carpenter v. New York etc. R. R. Co.*, 644.
6. DUTY OF RAILWAY COMPANY TO PROTECT PASSENGERS IN ITS SLEEPING-CARS. — A corporation engaged in running sleeping-coaches with sections separated from the aisle by curtains only is bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. While not an insurer, it must exercise diligence to protect its sleeping customers from robbery, and is bound to use a degree of care commensurate with the danger to which they are exposed. *Id.*
7. CONTRIBUTORY NEGLIGENCE BY RAILROAD PASSENGER. — Knowledge by a railroad passenger that no platform is provided for passengers to enter or leave trains on the north side of the track, while such a platform is provided on the south side of it, is notice of a rule of the company that he should get on and off on the south side; and if, voluntarily disregarding this rule, he alights on the north side, in the night-time, and is thereby injured by falling into an unguarded ditch dug by the company, he is guilty of negligence, and cannot recover damages. *Drake v. Pennsylvania R. R. Co.*, 663.
8. *Id.* — A passenger impliedly assents to all reasonable rules and regulations of the railway company, and if injury results to him from his voluntary disregard thereof, he cannot recover damages from the company. *Id.*
9. *Id.* — EVIDENCE of occasional instances of passengers alighting on the side of the train where there was no platform, without the knowledge or consent of the company, is inadmissible to affect its liability for injury to a passenger alighting there, with notice that passengers were prohibited from so alighting, and that there was a platform on the other side. *Id.*
10. *Id.* — WAIVER OF REGULATION. — Proof of permission by a railway company, to persons residing north of its road, to cross its right of way and track, in going and returning in different parts of a town, does not show a waiver of its regulations affecting its passengers with notice to alight on the south side, nor permission to them to alight on the north side. *Id.*

See NEGLIGENCE, 7; TELEGRAPH COMPANIES.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE WITHOUT IMMEDIATE DELIVERY OR CHANGE OF POSSESSION VOID AS AGAINST CREDITORS WHEN.**—A chattel mortgage which is not accompanied by an immediate delivery or followed by an actual or continued change of possession of the chattels mortgaged, and which is annotated upon an agreement that the mortgagor may remain in possession of the property covered by the mortgage, and sell the same at retail, and use the avails in substantially the same manner as before the execution of the mortgage, is void as against the creditors of the mortgagor. And the term "creditors" includes all persons who were such while the chattels remained in the possession of the mortgagor under that agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee. *Mandeville v. Avery*, 838.
2. **RIGHT OF CREDITOR TO ATTACK CHATTEL MORTGAGE AS FRAUDULENT NOT WAIVED WHEN.**—An assent by a creditor to an arrangement between a mortgagor and mortgagee which will preclude him from asserting his rights as a creditor against the property mortgaged must be such as to create against him an equitable estoppel, or it must exist in agreement supported by a valid consideration. An alleged assent made upon condition that the mortgagor should return to the creditor a portion of the goods purchased of him, the purchase price for which constituted the indebtedness, and would make payments to him, neither of which conditions were complied with, is without consideration, and therefore not binding. *Id.*
3. **CREDITOR NOT DEPRIVED OF RIGHT TO ATTACK CHATTEL MORTGAGE BY AGREEMENT MADE BY HIS AGENT WHEN.**—A creditor cannot be deprived of his legal right to attack a chattel mortgage as fraudulent, by an agreement made by his agent waiving such right, without evidence that he knew of the defect in the mortgage, and had authorized his agent to make an agreement in reference thereto, or had acquiesced in such an agreement when made. *Id.*
4. **MORTGAGEE CANNOT RETAIN PROPERTY OR ITS PROCEEDS OBTAINED UNDER FRAUDULENT MORTGAGE.**—Although a mortgagee may have an honest claim, he cannot, as against a pursuing creditor, retain property obtained by him under his mortgage if it be fraudulent; and if he takes and sells the property by virtue of his mortgage before any lien thereon is acquired by a creditor, the latter may compel him to refund the proceeds; for the mortgage being void, all proceedings under it are also void. The right of the creditor cannot be defeated by a fraudulent mortgagee by merely selling the mortgaged property. *Id.*
5. **SALE OF PROPERTY BY AGENT—LIABILITY TO MORTGAGEE.**—A valid chattel mortgage properly recorded, though overdue and unpaid, is notice to the world, and though the possession of the property covered by the mortgage is in the mortgagor, a commission merchant who receives and sells it as the consignee of the wife of the mortgagor, and as her property, and then pays the proceeds of the sale to her as his consignee, without any actual knowledge on his part of the existence of the mortgage, and without the knowledge or consent of the mortgagee, is liable to the latter as for a conversion of the property. *Brown v. James H. Campbell Co.*, 254.

See EXECUTIONS, 1.

CHECKS.

See BANKS AND BANKING, 1-4.

CIVIL RIGHTS.

1. DISCRIMINATION BECAUSE OF COLOR. — Under the common law and the statutes of Michigan, the keeper of a public restaurant cannot discriminate against a colored person as to the part of the building in which he shall be served, solely on account of his color. In a suit to recover damages, the colored person thus discriminated against need not declare upon nor refer to the statute. *Ferguson v. Gies*, 576.
2. *Id.* — In Michigan, there is an absolute, unconditional equality of white and colored persons before the law in all public places, and a discrimination in such place against a colored man, solely on account of his color, is a ground for the recovery of civil damages. *Id.*

CIVIL DAMAGES.

See CIVIL RIGHTS, 1, 2.

COMMON CARRIERS.

See CARRIERS.

CONFESSIONS.

See CRIMINAL LAW, 3.

CONFLICT OF LAWS.

See ATTACHMENT AND GARNISHMENT, 4; EXECUTORS AND ADMINISTRATORS, 1-3.

CONSIDERATION.

See CONTRACTS, 1; NEGOTIABLE INSTRUMENTS, 10.

CONSPIRACY.

See ACTIONS, 2.

CONSTITUTIONAL LAW.

See CORPORATIONS, 1, 2, 4; LEGISLATURE; STATUTES.

CONTRACTS.

1. CONSIDERATION FOR PROMISE, WHAT SUFFICIENT. — To constitute a valid consideration for a promise, it is not necessary for the promisor to be benefited, or for the promisee to be injured; a waiver of a legal right by the promisee at the request of the promisor is sufficient. And therefore a promise by an uncle to his nephew, that if the latter would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, he would pay him five thousand dollars, is founded upon a good consideration, and is enforceable. *Hamer v. Sidway*, 693.
2. PERFORMANCE — EVIDENCE. — Where, in an action to recover under a contract to drill an oil-well at a certain price per foot, a substantial compliance with the terms of the contract is shown, evidence of the average cost of drilling a well at the time of the drilling of the one in suit is immaterial and inadmissible. *Holmes v. Charters Oil Co.*, 919.

3. **SUBSTANTIAL PERFORMANCE—MEASURE OF RECOVERY.** — Where, under a parol contract to drill an oil-well at a certain price per foot, the contractor has drilled the well to such depth as to produce oil, and has then lost his tools and left them in the well, after which the owner has taken possession and used the well for the production of oil, the contractor is entitled to recover the contract price for drilling the well, less such deduction for damages as will compensate the owner for loss sustained by the failure of the contractor to remove his tools from the bottom of the well. *Id.*
 4. **DAMAGES FOR BREACH OF CONTRACT.** — One who violates his contract with another is liable for all the direct and proximate damages which result from such violation, and the party who is prevented from performing his contract by such violation is entitled to recover the value thereof. *Stanton v. New York etc. R'y Co.*, 110.
 5. **"TRUST" AND "COMBINATION" AGAINST TRADE, AGREEMENT IN AID OF, UNENFORCEABLE.** — An agreement under which an association is formed, for the purpose of increasing the price and decreasing the manufacture of candles within a certain territory, is void as being contrary to public policy, and is not enforceable in the courts. *Emery v. Ohio Candle Co.*, 819.
 6. **STIPULATION THAT THE DECISION IN ONE CASE SHALL GOVERN ANOTHER** is valid and enforceable. *Riggs v. Commercial M. Ins. Co.*, 716.
 7. **PARTIES CANNOT OUST COURTS OF JURISDICTION WHEN.** — It is not competent for parties to a contract, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of persons named in the contract shall be final and conclusive. And therefore a provision in the by-laws of a mutual benefit insurance society that the decision of its officers on a member's claim for benefits shall be final and conclusive is ineffective, and cannot bar an action to recover such benefits. *Supreme Council v. Forsinger*, 196.
 8. **DELIVERY, WHICH IS AN ESSENTIAL PART OF THE EXECUTION OF AN INSTRUMENT, CANNOT BE INFERRED FROM POSSESSION.** *Wilbur v. Stoeptel*, 568.
- See ASSIGNMENT; ATTORNEY AND CLIENT; CHATTEL MORTGAGES, 2; CORPORATIONS, 2, 5-8, 15; COVENANTS; DAMAGES, 5, 6; EVIDENCE, 10, 11, 15; EXECUTORS AND ADMINISTRATORS, 4-10; JUDGMENTS, 2, 3; MASTER AND SERVANT, 9; SPECIFIC PERFORMANCE, 3; STATUTES, 5.**

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 3-7.

CONVERSION.

See CHATTEL MORTGAGES, 5.

CONTEMPT.

See STATUTES, 6.

CORPORATIONS

1. **CONSTITUTIONAL LAW — RIGHT TO AMEND CORPORATE CHARTER.** — When a state has reserved the power by general statute to change, modify, or destroy any corporation at will, and has subsequently granted a charter to a railroad corporation, giving it power to build its road where it may deem proper, the state may so amend such charter, after the corporation

has located but before it has constructed its road, as to confine it to a specified route on certain enumerated conditions as to the construction of the road through a certain county. *Mason etc. R. R. Co. v. Gibson*, 135.

2. IN.—RIGHT TO AMEND CORPORATE CHARTER.—OBLIGATION OF CONTRACTS.

—Where a state has reserved the power by general statute to change, modify, or destroy any corporation at will, such right is not abridged or in any manner affected by executory contracts entered into by a corporation with third persons, or by such persons with their subcontractors, before an act amending such corporation's charter was passed. All parties are bound to submission of the general law of the state under which the power exercised was reserved. If such contracts cannot be performed consistently with the alteration in the charter made by the amending statute, their performance, in so far as thus hindered or obstructed, will be excused, under the rule that performance of contracts rendered impossible by act of law is excused. *Id.*

3. AMENDMENT OF CHARTER.—When the charter of a corporation is amended under power reserved in the state, by adding a proviso which operates as a limitation and restriction upon some of the general terms of the charter, such amendment is valid, so long as there is no such repugnance in the proviso to the main purpose of the charter as that the two cannot stand together; and if there is an irreconcilable conflict between them, the amendment will prevail. *Id.*

4. CONSTITUTIONAL LAW.—MUNICIPAL AID TO CONSTRUCT RAILROAD.—

Where a statute amending a railroad charter provides that the road shall run in and through the corporate limits of a town, or within one mile of the court-house thereof, on certain conditions, and that the increased cost "shall be paid by the said town or the citizens thereof," but does not impose any tax on the persons or property within the town, nor provide that it shall raise such funds as public revenue, and contemplates that the payment is to be made by the people voluntarily, and not under compulsion, such statute is not unconstitutional as seeking to enable the town in its corporate capacity to apply corporate money to the construction of a railroad. *Id.*

5. CONTRACT BY PROMOTERS.—RATIFICATION.—A contract made by the promoters of a corporation to aid the incipient corporation, as a reasonable means for carrying out its authorized purposes, and afterwards ratified by the corporation, makes it liable for everything which has been done under the contract. Such ratification relates back to the execution of the contract, and renders it obligatory from the outset. *Stanton v. New York etc. R'y Co.*, 110.

6. ID.—A corporation has power, when organized, to ratify a contract made by its promoters, when it is one within the purposes for which the corporation was organized, and is a reasonable means of carrying out those purposes, and the ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into; nor can the corporation in such case take advantage of its own acts or omissions to escape liability on the contract. *Id.*

7. CONTRACT BY PART OF STOCKHOLDERS.—An agreement between two of the three stockholders and directors of a corporation, that a purchaser of stock shall be employed as business manager for a term of years, and for the repurchase of his stock at a stated price if he desires to retire at the end of the term, is inseverable, and void as against public policy, unless assented to by all the stockholders. *Wilber v. Stoppel*, 566.

8. **CONTRACTS—KNOWLEDGE AND ASSENT.**—In order to make a contract valid which would be void without the consent of all the stockholders of a corporation, there must be evidence that they had knowledge that it was to be made, and that they assented. *Id.*
9. **UNAUTHORIZED MORTGAGE BY—LIEN OF MORTGAGEE AS AGAINST CREDITOR.**—A mortgage given by a railroad company to aid in constructing and equipping its road, and for a greater sum than twice the amount of its paid-up capital stock, is unauthorized and void as between it and its stockholders; but as between *bona fide* holders of the mortgage bonds and the corporation or its subsequent creditors with notice of the mortgage, the latter is a first lien on the mortgaged property, and such creditors cannot set up the fraud of the corporation as a defense against such bondholders. *Fidelity Ins. etc. Co. v. Western Pennsylvania R. R. Co.*, 911.
10. **CORPORATION ACQUIRING THROUGH FORECLOSURE SALE PROPERTY OF ANOTHER CORPORATION NOT LIABLE FOR GENERAL DEBTS OF LATTER.**—A corporation which succeeds to the property and rights of another corporation, through the medium of a sale upon a decree of foreclosure, is not responsible for the general debts of the corporation whose property and franchises it acquires. *Midland R'y Co. v. Fisher*, 189.
11. **OBLIGATION OF CORPORATION TO PERFORM AGREEMENT OF ITS GRANTOR NOT MERE GENERAL DEBT OF LATTER WHEN.**—Where a corporation has, in a deed conveying to it a right of way for a railroad, agreed to build a fence, the right of the grantor to have this agreement performed by another corporation, which, under a sale upon a decree of foreclosure, succeeds to the rights of the old corporation, is not a mere general debt of the old corporation, but is a right blended with the right of the new corporation to use and occupy the land with its track. The liability of the new corporation does not rest upon the claim against the old corporation, but upon the duty which arises out of its own occupancy of the land, and it cannot be permitted to enjoy the easement, and yet refuse to perform the agreement which created and conferred the easement. *Id.*
12. **LIABILITY OF DIRECTORS ON NOTE EXECUTED BY THEM.**—A note by which "the directors" of a corporation promise to pay a certain sum, and signed by them without official designation, must be regarded as the undertaking of the parties whose names appear to it as obligors, and not that of the corporation; and the question of individual or corporate liability must be raised by answer, and not by demurrer. *McKenry v. Edwards*, 229.
13. **LIABILITY ON NOTE SIGNED BY DIRECTORS.**—A note by which the directors of a corporation promise to pay a certain sum, and signed by them without official designation, is *prima facie* the obligation of the signers alone, and imports no undertaking to pay on the part of the corporation. In order to make it liable on the note, it is necessary to aver and prove that the undertaking was for the use and benefit of the corporation, and that by mutual mistake the note was executed and signed by the obligors as individuals. *Id.*
14. **PERSONAL LIABILITY OF DIRECTORS OF CORPORATION FOR CONTRACT ENTERED IN CORPORATE NAME.**—Persons who, as directors of a corporation and in its name, contract with innocent third parties, before the legal amount of corporate stock has been subscribed, do not create any corporate liability, but become personally liable, although they contracted under the *bona fide* belief that corporate authority to do

so was vested in them, and the measure of damages is the loss sustained by the innocent third party by reason of his not obtaining the valid contract which such directors assumed to execute. *Farmers' Co-operative Trust Co. v. Floyd*, 846.

15. **STATUTE OF LIMITATIONS — LIABILITY OF STOCKHOLDERS.** — When a corporation has become wholly insolvent, and has ceased to do business, and has assigned its property for the benefit of creditors, suit to enforce their statutory liability may be commenced against the stockholders by creditors, without any of them first recovering judgment and having an execution returned unsatisfied, and the statute of limitations begins to run from that time against the right of action. *Barrick v. Gifford*, 798.
16. **STATUTE OF LIMITATIONS — LIABILITY OF STOCKHOLDERS.** — Where a corporation has property and continues to do business, a creditor must first obtain judgment against it, and have an execution returned unsatisfied, before he can bring suit against the stockholders upon their individual statutory liability, and the statute of limitations begins to run against them from that time, and not before. *Id.*
17. **METHOD OF ENFORCING STATUTORY LIABILITIES OF STOCKHOLDERS.** — A suit in the nature of a creditor's bill is the proper method to be adopted by creditors of an insolvent corporation to enforce the statutory liability of its stockholders, and when such suit is brought, no creditor can acquire priority nor maintain a separate suit to enforce such liability in his own behalf. *Id.*
18. **INSOLVENCY — CREDITOR'S BILL — STATUTE OF LIMITATIONS.** — A suit in the nature of a creditor's bill to enforce the statutory liability of the stockholders of an insolvent corporation saves the running of the statute of limitations, not only as against the claim of the one filing it, but also as against the claim of every creditor of the corporation who comes into the action before its final termination. *Id.*
19. **LIABILITY OF STOCKHOLDERS.** — A change in the stockholders of a corporation has no effect upon its legal status. It remains through all changes in the personnel of its stockholders, the same legal entity, possessed of the same rights, and subject to the same liabilities. *Id.*
20. **LIABILITY OF NEW STOCKHOLDER.** — When one purchases or acquires stock in a corporation, no matter at what time, he acquires a fractional interest in the capital stock, assets, profits, and liabilities of the corporation. *Id.*
21. **LIABILITY OF NEW STOCKHOLDER.** — If an existing stockholder of an insolvent corporation is solvent, it is immaterial, so far as his statutory liability to creditors is concerned, when he became the owner of the stock, or from whom he acquired it. *Id.*
22. **CHANGE OF NAME OF CORPORATION WILL NOT RELIEVE ADMITTED STOCK SUBSCRIBER** therein from liability to the creditors of the corporation for the amount remaining due on the stock subscribed by him. *Howard v. Glenn*, 156.
23. **FRAUD OF CORPORATION NOT AVAILABLE AS DEFENSE TO STOCKHOLDER.** — In an action by creditors of a corporation to collect unpaid subscriptions by a stockholder, the defense of fraud on the part of the corporation in inducing the stockholder to subscribe is unavailable. *Id.*
24. **LIABILITY OF STOCKHOLDER FOR UNPAID SUBSCRIPTIONS.** — A plea that a decree upon which suit by creditors to collect unpaid stock subscriptions to a corporation is based, provided that if the stockholders should pay a certain per cent upon their subscriptions within a certain time, this

- would be sufficient to pay off the indebtedness of the corporation, is not available to such stockholder if it fails to allege that he paid or offered to pay such per cent on his unpaid stock subscriptions. *Id.*
25. **IN.** — A stockholder of a corporation is liable to its creditors upon his unpaid stock subscription, and the fact that other stockholders may have been released as to their subscriptions by a decree of court is no defense to him, unless such action increased his liability. *Id.*
26. **STOCKHOLDER, WHEN BOUND BY DECREE.** — A decree of a court of competent jurisdiction in an action against a corporation by its creditors is binding upon a stockholder of such corporation, although he is a non-resident and not personally served with process, and though he never appeared or had notice of such suit. *Id.*
27. **JURISDICTION OVER NON-RESIDENT STOCKHOLDERS.** — A trustee appointed by the decree of a court of competent jurisdiction to maintain suit for the unpaid stock subscriptions to a corporation may sue non-resident stockholders who were not personally served with process, and who had no notice of the suit in which such decree was rendered. *Id.*
28. **CORPORATION BOOKS AS EVIDENCE OF STOCK SUBSCRIPTION.** — In an action by the creditors of a corporation to recover the amount due by a subscriber to its stock, proof that the corporation to the stock of which such stockholder admittedly subscribed is the same as that in the name of which suit is brought makes the books of such corporation admissible as evidence as to the amount and value of his subscription, or of any other transaction between him and such corporation. *Id.*
29. **SHARE-HOLDER IN CORPORATION NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE OF RESOLUTIONS OF ITS DIRECTORS.** — A share-holder in a corporation is not chargeable with constructive notice of resolutions adopted by its board of directors, or of provisions in its by-laws regulating the mode in which its business shall be transacted with its customers; and when he deals with the corporation as a customer, his rights are in no wise limited by its regulations or by-laws not brought to his knowledge. *Pearson v. Western Union Tel. Co.*, 662.

BANKS AND BANKING.

See **INSURANCE**, 6; **TAXATION**.

COSTS.

See **SPECIFIC PERFORMANCE**, 2.

CO-TENANCY.

1. **WASTE AND DAMAGES.** — A tenant in common who cuts and removes timber from unoccupied lands is answerable to his co-tenant in an action on the case. *Benedict v. Torrent*, 589.
2. **CONVEYANCE OF A PORTION OF THE COMMON LANDS** by metes and bounds, even when they are composed of separate parcels, may be treated as void by the other co-tenants. *Barnes v. Lynch*, 470.
3. **VOID CONVEYANCE BY TENANT IN COMMON.** — Where one tenant in common conveys to a stranger any but an undivided interest in the whole of the land, and such interest is prejudicial to the rights of the other co-tenants, such conveyance is void as to them. When partition is had between the co-tenants, such conveyance may be considered in partitioning the land so as to secure the interest of such purchaser. *Benedict v. Torrent*, 589.

4. **SALE OF INTEREST IN TIMBER—RIGHT OF PURCHASER.**—One tenant in common cannot convey his interest in the timber on the common land, and thereby make his co-tenants tenants in common with his grantees. The interest thus gained by such purchaser is such interest as shall be set off to his grantor in partition proceedings. Such partition must be made of the entirety of the estate according to the shares held by each co-tenant. The purchaser will then be entitled to all timber interests secured by his conveyance. *Id.*

See PARTITION.

COUPONS.

See MORTGAGES, 2.

COVENANT—ACTION OF.

ACTION OF COVENANT LIES AGAINST GRANTOR OF DEED POLL. *Midland etc. Ry Co. v. Fisher*, 189.

COVENANTS.

1. **RULE FOR INTERPRETATION OF.**—The primary rule for the interpretation of a covenant contained in a deed is to gather the intention of the parties from their words, by reading, not simply a single clause, but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met. *Clark v. Devoe*, 552.
2. **COVENANT RUNNING WITH LAND, WHAT IT.**—An agreement in a deed conveying a right of way for a railroad, to fence the same, is a covenant running with the land and essentially inhering in it, and such covenant binds the grantee of the original covenantor, and inures to the benefit of the owner of the servient estate in which the easement with its encumbrance inheres. *Midland etc. Ry Co. v. Fisher*, 189.
3. **GRANTOR OF ORIGINAL COVENANTOR BOUND TO PERFORM LATTER'S AGREEMENTS WHEN.**—When a deed which creates a right discloses a covenant which burdens the right, a subsequent grantee of the original covenantor, in accepting such deed and asserting a claim to the privileges conferred by it, becomes bound to perform the agreement. And when, in addition to the covenant in the deed, the facts open to observation show that the covenant has not been kept, such grantee cannot justly claim the rights of a purchaser without notice. *Id.*

See EASEMENTS.

CREDITOR'S BILL.

See CORPORATIONS, 17, 18.

CRIMINAL LAW.

1. **PROOF OF INTENT FROM DISTINCT CRIME.**—Proof of a different crime from the one charged, though generally objectionable, is admissible when both crimes are closely linked or connected, especially in the *res gesta*, and also when such proof is pertinent and necessary to show intent. When the intent is thus shown, further proof of premeditation is unnecessary. *State v. Deschamps*, 392.
2. **RIGHT OF ACCUSED TO QUESTION ADMISSIBILITY OF EVIDENCE.**—While the court must be satisfied of the competency and admissibility of evidence

offered, the accused has the right to prevent the admission of incompetent or inadmissible evidence against him; and the fact that the trial judge is satisfied of the competency and admissibility of proffered testimony does not exclude the right of the accused to question it. *State v. Miller*, 418.

2. **RIGHT OF ACCUSED TO CROSS-EXAMINE WITNESSES.** — The admissibility in evidence of a confession by the accused must necessarily be tried and determined by the court before the same is permitted to go to the jury as evidence; but in such trial the accused has a right to participate, and to cross-examine the witnesses by whom the confession is sought to be proved. *Id.*
4. **PRACITION — DISCHARGE OF JURY WITHOUT VERDICT.** — Where, in the trial of a criminal case, the evidence is excluded from the jury on the ground that the indictment charges no offense, the jury must be discharged without rendering a verdict. *State v. Brown*, 790.
5. **ASSAULT WITH DEADLY WEAPON — PRESUMPTION OF INTENT TO KILL.** — An assault made with a weapon likely to produce death, but from which no killing results, does not raise a presumption of an intent to kill. Malice in an assault by stabbing does not necessarily include an intention to kill. *Patterson v. State*, 152.
6. **UNDER FALSE PRETENSES, OBTAINING GOODS.** — Where an agent obtains personal property belonging to his principal, and to the immediate possession of which the latter is entitled, by means of false statements made to a third party, the agent is not guilty of obtaining goods or property by false pretenses. Nothing is a false pretense, within the meaning of the statute, which has no tendency to and does not harm a person. *In re Cameron*, 282.
7. **INCEST, SINGLE ACT CONSTITUTES.** — A single act of sexual intercourse between persons related by blood or affinity within the degree prohibited by statute constitutes incest. *State v. Brown*, 790.
8. **SUFFICIENT AVERMENT.** — Under a statute prohibiting the commission of the sexual act between persons "nearer of kin than cousins," an indictment alleging the commission of the sexual act by uncle and niece is sufficient, without a direct averment that that relationship is nearer than that between cousins, or that they were related by blood or affinity. *Id.*
9. **SUFFICIENT AVERMENT.** — An indictment charging incest between an unmarried uncle and his niece is equivalent to an averment that she was not his wife. *Id.*
10. **INCEST, SINGLE ACT CONSTITUTES.** — Incest is sexual intercourse, either habitual or in a single instance, either under form of marriage or without it, between persons too nearly related in consanguinity or affinity to be entitled to intermarry. *Id.*
11. **SUFFICIENT AVERMENT.** — Under a statute prohibiting the commission of the sexual act between persons "nearer of kin than cousins," an indictment charging incest between uncle and niece need not allege that they were not husband and wife, whether they had gone through the ceremony of marriage or not. Nor is it material in such case that the marriage was celebrated in a country where it was valid. *Id.*
12. **LIBEL OF FAMILY.** — A false publication that a member of a particular family, by name, has been a state-prison convict, and directed against the whole family, is a criminal libel of the whole family of that name. *State v. Brady*, 296.

13. ANY PUBLICATION WHICH TENDS TO DEGRADE or injure another person, or to bring him in contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, or of any act odious and disgraceful to society, is libelous, unless the same is shown to be true. *Id.*
14. LOTTERY, WHAT IS. — Any scheme for the distribution of prizes by lot or chance, or by which one, on paying money or other valuable thing to another, receives a ticket which entitles him to receive in return a larger value or nothing, as some formula of chance may determine, is a violation of a city ordinance prohibiting lotteries. *State v. Bonell*, 412.
15. *Id.* — A scheme by which a person who pays five cents for a package of tea is entitled to select it from a number of envelopes, some of which, in addition to tea, contain a ticket which entitles the purchaser to a prize, while the others contain nothing but the tea, is a lottery; and the sale of such packages of tea is a violation of a city ordinance prohibiting lotteries. *Id.*
16. HOMICIDE TO AVOID ARREST. — Where an officer is killed, with knowledge or reasonable grounds of belief that he intended and was endeavoring to make an arrest for a felony with which the accused was charged, it is murder; but if the killing was done suddenly, under the surprise of a night visit by an armed man, without knowledge of his purpose or official character, or reasonable ground of belief as to the same, and without malice, it is manslaughter. *Groom v. State*, 179.
17. *Id.* — INSTRUCTIONS. — Where an armed officer, at night, with a posse, and without a warrant, is killed in attempting to arrest a person charged with felony, and the only expression used by the officer to indicate his official capacity or his purpose to arrest was, that "You are mine," or that "You are my meat," it is reversible error, upon the trial of the accused, to use the expression "You are mine," and to exclude the other and stronger expression in charging the jury, when the dividing line in the case between murder and manslaughter is upon whether or not the conduct and language of the officer, taken in connection with all the circumstances, indicated to the accused a purpose to arrest him for felony, rather than to molest him by mere violence for some lawless purpose. *Id.*
18. WHAT WILL REDUCE MURDER TO MANSLAUGHTER — INSTRUCTIONS. — A father has the right to protect his daughter from the personal violence of her husband, and to go to his premises for that purpose; and if he kills him in the heat of sudden passion, in an effort made in good faith to so protect his daughter, it is not necessary that a blow should be given, or a trespass committed on the person of the accused, to reduce the crime from murder to manslaughter. It is reversible error to fail to so instruct the jury, even if a verdict of manslaughter is returned. *Campbell v. Commonwealth*, 348.
19. *Id.* — INSTRUCTIONS. — On the trial of a father for the killing of his daughter's husband, the jury should be instructed, when such instruction is justified by the evidence, that as matter of law a father has the right to protect his daughter from great bodily harm against the violence of her husband; that if prior to the day of the tragedy she had been beaten by her husband so as to endanger her life or inflict upon her great bodily injury, of which the accused had knowledge, and that the violence was renewed on the night of tragedy, the father, on receiving information of the fact, had a right to arm himself and go to the residence of the husband to protect his daughter from his violence; and that if finding his

- daughter and her children expelled from their home into the street by the husband, and suddenly meeting him in the heat of sudden passion caused by the violence to the wife, the father shot him, not in necessary self-defense, and without malice, he is guilty of manslaughter. *Id.*
20. **MURDER — INTENT PRESUMED FROM PERPETRATION OF ANOTHER FELONY.** — A homicide committed by an accused while engaged in the perpetration of a felony, as rape or sodomy, is murder, and the absence of proof of premeditation or preconceived design to kill is insufficient to reduce the crime to manslaughter. *State v. Deschamps*, 392.
21. **MURDER — PROOF NECESSARY TO ESTABLISH.** — Simple proof of a homicide is insufficient to establish the crime of murder. The prosecution must first affirmatively prove the existence of malice in the perpetrator, in order to put him upon his defense. *Id.*
22. **Id. — PRESUMPTION FROM ACT OF KILLING.** — When an act is committed deliberately with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; but the presumption which arises from a killing, unattended with such circumstances of violence, is that of murder in the second degree, or of manslaughter. *Id.*
23. **Id. — PROOF OF MALICE.** — Malice may be inferred from many circumstances, other than the use of a deadly weapon, and since proof of it usually lies in circumstantial evidence, evidence of any facts which go to afford an inference of its existence is admissible. *Id.*
24. **Id. — EVIDENCE OF INTENT.** — Where the *scienter* or *quo animo* forms an essential or indispensable part of the inquiry, testimony is admissible of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent, notwithstanding they may constitute a different crime in law. *Id.*
25. **MURDER — EVIDENCE.** — On a trial for murder, where it appears that a father, receiving information that his daughter was being abused by her husband, seized his pistol and went to the residence of the husband, and found the daughter and her children, at night, in the street, driven from her home, and on meeting her husband, shot and killed him, after some words had passed between them, evidence of the son-in-law's previous threats against the accused, and of previous violence against the wife, is competent to show the lawful purpose of the accused in going to the place of the tragedy; but the exclusion of such evidence is not reversible error, when other evidence admitted shows the good faith of the father in his effort to protect the daughter, and that she was in constant danger of bodily harm from her husband. *Campbell v. Commonwealth*, 348.
26. **Id. — EVIDENCE OF SELF-DEFENSE.** — Where a father has knowledge of cruel treatment inflicted upon his daughter by her husband, endangering her life, it is his natural and legal right to go to the rescue of his daughter, to prevent the infliction upon her person of cruel and inhuman blows; and if in his effort to do so he kills the husband, evidence of the threats of the latter to take the life of the accused, accompanied by an effort to do so, such as an attempt to draw a pistol at the time, is competent on the issue of self-defense. *Id.*
27. **RAPE — AGE OF CONSENT.** — A female under the age of twelve years is incapable of yielding consent to sexual intercourse. *State v. Miller*, 418.

See MUNICIPAL CORPORATIONS, 10.

DAMAGES.

1. IF A STATUTE IMPOSES UPON ANY PERSON a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty he is liable for any injury or detriment caused thereby, if the injury so caused is of the kind the statute was intended to prevent. *Ferguson v. Gies*, 576.
 2. ABSENCE OF MALICE on the part of defendant and his agents will not relieve him from liability for damages occasioned by his or their wrongful acts. *McKes v. Delaware Canal Co.*, 740.
 3. MEASURE OF DAMAGES. — In an action against a railroad company to recover for personal injury, a finding of gross negligence against the company, without a finding of willful misconduct or an entire want of care raising a presumption of conscious indifference to consequences and the legal rights of others, will not authorize a verdict for exemplary or punitive damages. Such finding will only justify a verdict for compensatory damages. *Chattanooga etc. R. R. Co. v. Liddell*, 169.
 4. NEGLIGENCE — INSTRUCTION. — In an action against a railroad company to recover for personal injury, an instruction that a finding of gross negligence against the company would entitle plaintiff to recover punitive damages as punishment of the railroad company is error, when the statute provides that such damages may be given "to deter the wrongdoer from repeating the trespass." The instruction should be given in the words of the statute. *Id.*
 5. NOMINAL DAMAGES MEAN NO DAMAGES AT ALL. — They exist only in name, and not in amount, and should only be awarded where there has been a breach of contract, and no actual damages whatever have been or can be shown. *Stanton v. New York etc. R'y Co.*, 110.
 6. MENTAL ANGUISH, RECOVERY MAY BE HAD FOR, WHEN. — The jury in assessing damages for the breach of a contract may take into consideration the mental anguish of the plaintiffs, if they suffered any mental anguish on account of the matters set out in the complaint. If a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part. *Renihan v. Wright*, 249.
- See AGENCY, 4; ANIMALS; ASSIGNMENT, 2; CIVIL RIGHTS, 1, 2; CONTRACTS, 3, 4; CORPORATIONS, 14; JUDGMENTS, 10; LIBEL AND SLANDER; SALES, 12; TELEGRAPH COMPANIES.

DECLARATIONS.

See AGENCY, 5; EVIDENCE, 3-6; WILLS, 20.

DEDICATION.

1. STREETS DEDICATED BY MAPS. — Laying out a large tract of land, and cutting it up into house lots and ways, does not give every purchaser of a lot a right of way over every street. He has no right to insist upon the keeping open of a street which does not connect his lands with the public highway, and which is desirable because it is nearest the water and in full view thereof. *Pearson v. Allen*, 426.

2. DEDICATION BY MAP. — Including a space upon a map with dotted lines is not a sufficient indication that it is to be kept open for the benefit of the public or of a purchaser of lands in the tract represented on the map. *Id.*

See WATERCOURSES, 3.

DEEDS.

1. DELIVERY. — It is an essential characteristic and an indispensable feature of every delivery of a deed, whether absolute or conditional, that there must be a parting with the possession of it, and with all power and control over it, by the grantor for the benefit of the grantee at the time of the delivery. *Porter v. Woodhouse*, 131.
2. DELIVERY of a deed is as essential to the passing of the title as is the signing or acknowledgment of it. It is the final act, without which all other formalities are ineffectual; and to constitute delivery, the grantor must part with the legal possession of the deed, and with all right to retain it. The present and future dominion over the deed must pass from the grantor in his lifetime. *Id.*
3. DELIVERY, WHAT IS NOT. — Where a grantor formally executes a deed, except delivery, and then places it in a locked box, putting the latter in the possession of her servant, with the information that it contains the deed, but without divulging the name of the grantee therein, and directing that the box be not opened until after the death and funeral of the grantor, which direction is followed, there is no such parting with the possession, custody, and control of the deed by the grantor as constitutes a valid delivery. *Id.*
4. DELIVERY of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee; but where the proof fails to show that the grantor ever did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of intent becomes immaterial. *Id.*
5. DEED POLL, ACCEPTANCE OR, EFFECT OF. — The acceptance of a deed poll by the grantee makes it the mutual written contract of the parties, and therefore the statute of limitations respecting verbal contracts does not apply thereto. *Midland etc. Ry Co. v. Fisher*, 189.
6. CONVEYANCE OF LAND OF NON-NAVIGABLE LAKE. — Where the owner of land surrounding a non-navigable inland lake, longer than it is broad, conveys a portion of the land bordering on the lake by a deed which describes the lake as one of the boundaries, the title of the purchaser extends to the center of the lake. *Lembeck v. Nye*, 828.
7. *Id.* — Where the owner of land surrounding a non-navigable lake conveys a portion thereof by deed describing the margin of the lake as one of the boundaries, the title of the purchaser extends to low-water mark only. *Id.*
8. *Id.* — Where the owner of land surrounded by a non-navigable inland lake conveys a portion of the land by deed describing it by metes and bounds, without reference to the lake, the title of the purchaser only extends to the lines mentioned in the deed. *Id.*
9. CONVEYANCE OF BATTURE OR ALLUVION RIGHTS. — A deed which describes the property sold as fronting on a certain street, and extending between certain lines to the river, without guaranty of measurement, conveys the batture or alluvion rights to the river frontage described in the deed. *Meyers v. Mathis*, 385.

10. WHEN DEED CONVEYS BATTURE OR ALLUVION RIGHTS. — A deed describing the property sold as fronting on a river conveys the batture or alluvion rights without any provision to that effect contained in the deed. *Id.*

See CO-TENANCY, 2-4; COVENANTS; EASEMENTS; HUSBAND AND WIFE, 2-12; MORTGAGES, 1.

DEFINITIONS.

- "Cashier." *Knickerbocker v. Wilcox*, 505.
 "Children." *Oyster v. Knoll*, 890.
 "Combination." *Emery v. Ohio Candle Co.*, 819.
 "Correct plat." *Timothy v. Chambers*, 163.
 "Creditors." *Mandeville v. Avery*, 678.
 "Freedom of the press." *Riley v. Lee*, 358.
 "Garbage." *People v. Gordon*, 524.
 "Homestead." *Timothy v. Chambers*, 163.
 "I will direct." *Oyster v. Knoll*, 890.
 "I will support." *Oyster v. Knoll*, 890.
 "It." *Chattanooga etc. R. R. Co. v. Liddell*, 169.
Lapsus lingua. *Chattanooga etc. R. R. Co. v. Liddell*, 169.
 Negligence. *Ellis v. Lake Shore etc. R. R. Co.*, 914.
 "Order of myself." *Jenkins v. Bass*, 344.
 Sale of a chattel. *Stephens v. Gifford*, 866.
 "The directors." *McKenney v. Edwards*, 339.
 "Trust." *Emery v. Ohio Candle Co.*, 819.
 "You are my meat." *Croom v. State*, 179.
 "You are mine." *Croom v. State*, 179.

DENTISTRY.

1. VALIDITY OF STATUTE REGULATING PRACTICE OF DENTISTRY. — The legislature may by statute regulate the practice of dentistry within the state, and may provide that only those possessing skill and learned in that profession shall be permitted to practice. It may prescribe the nature and extent of the qualifications required and the rules for ascertaining and determining whether those proposing to practice come up to the statutory standard. If the statute operates equally upon all who may desire to practice, and is enacted to promote the health and welfare of the people by excluding those who are ignorant and incapable, then the fact that the conditions may be rigorous, impolitic, and unjust will not render the statute invalid. Such legislation is not repugnant to section 2 of article 4 of the United States constitution, nor in conflict with section 1 of the fourteenth amendment thereto. *State v. Creditor*, 306.
2. *Id.* — A statute regulating the practice of dentistry, and prescribing the nature and extent of the qualifications required, and the rules for ascertaining and determining whether those proposing to practice come up to the statutory requirement, cannot be deemed to unduly discriminate between persons or classes, or to be unconstitutional because it exempts those engaged in the practice of dentistry within the state at the time of its enactment from the necessity of obtaining a diploma from a dental college, and requires such a diploma from all others. Although this fact may work a hardship upon a practicing dentist who comes into the state after the enactment of the statute, it does not render the law invalid. *Id.*

DEPUTY.

See SHERIFFS, 1.

DISORDERLY CONDUCT.

See CARRIERS, 3.

DIVORCE.

See MARRIAGE AND DIVORCE.

DRAFTS.

See NEGOTIABLE INSTRUMENTS, 6, 7.

EASEMENTS.

1. PUBLIC EASEMENTS, ACTION BY PRIVATE PERSON FOR OBSTRUCTION OF. — Though lands are dedicated to public use as streets and ways, their obstruction as such will not give a cause of action to a private person, unless he suffers private damages. *Pearson v. Allen*, 426.
2. RIGHT TO HAVE LAND BUILT UPON FOR THE BENEFIT OF LIGHT AND AIR to neighboring land may by deed be made an easement, and may be created by words of covenant as well as by words of grant. *Ladd v. City of Boston*, 481.
3. IN ORDER TO ATTACH AN EASEMENT TO A DOMINANT ESTATE, it is not necessary that it shall be created at the moment when either the dominant or the servient estate is created, if the purport of the deed is to create an easement for the benefit of the dominant estate. *Id.*
4. EASEMENTS RESTRICTING THE USE OF LANDS. — If the owners of lots fronting upon a square of land in a city mutually agree that certain places, avenues, and passage-ways, as laid out upon a plat, shall remain open as an appurtenant to several lots, and that no building shall be erected upon certain lots within ten feet of the front line thereof, unless a majority of the owners shall so elect, nor shall any building extend above a specified height, such agreement entitles each of the owners to an easement, and if a city, in the exercise of the right of eminent domain, takes a lot which is subject to such easement in favor of an owner of another lot, it must compensate him for the loss of his easement. *Id.*
5. EASEMENT ATTACHED TO LAND BY PLAIN AND DIRECT LANGUAGE ONLY. — It is only by the use of plain and direct language of a grantor that it can be held that he has created a right in the nature of an easement in land and attached it to one parcel as the dominant estate, and made the other servient thereto for all time to come. The creation of such a right will not be inferred by a forced construction of a covenant, nor by any amplification of its language beyond its natural meaning. Where, therefore, the owner of two adjoining city lots conveys one of them by a deed in which he covenants, for himself, his heirs, executors, administrators, and assigns, to and with the grantee, his heirs, executors, administrators, and assigns, that he will not erect or cause to be erected on said lot any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance, this covenant must be regarded as personal to the grantor, and solely against his own acts, and will not make him liable for the acts of his grantees or of subsequent owners, provided he neither does such acts himself nor causes them to be done. *Clark v. Devoe*, 652.

See COVENANTS, 2, 3.

EJECTMENT.

1. **PARTIES.** — An employee of defendant in ejectment, who is permitted to reside upon the disputed premises when the suit is brought, and who claims no interest in the land, is not a necessary party defendant. *Shaw v. Hill*, 607.
 2. **WHAT NECESSARY TO MAINTAIN.** — Plaintiff, who has no title to the land, but entered into possession in good faith, under a claim of right which proved valueless, may maintain ejectment against one who obtained possession through plaintiff's tenant, and who shows no title, right, or interest in the land, except a claim, merely asserted, and not proved, of being the original owner. *Id.*
 3. **EQUITABLE TITLE CANNOT BE SET UP** to overthrow a legal title in an action of ejectment. *Id.*
 4. **EQUITABLE TITLE — DEFENSE.** — The right of possession under color or claim of title by plaintiff in ejectment may be *prima facie* title as against a mere intruder; but when an equitable interest is shown by defendant which is unconnected with and independent of plaintiff's claim of title, such defendant may show in defense that plaintiff has no title to the premises. *Id.*
- See EXECUTORS AND ADMINISTRATORS, 1; RAILROAD COMPANIES, 2, 3.

ELECTION OF WIDOW.

See EXECUTORS AND ADMINISTRATORS, 5-10.

EMINENT DOMAIN.

See RAILROAD COMPANIES, 2, 3.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT, 2-5.

EQUITY.

COURT OF EQUITY HAS POWER TO RELIEVE PARTY AGAINST FORFEITURE and from penalty incurred, without willful neglect on his part, by the breach of a condition subsequent, upon the principle of equity jurisprudence that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression. A mortgagee, for a good consideration, agreed not to foreclose his mortgage, which was then due, until one year after the mortgagor's death, provided that during said period prior mortgages on the same property, which, with his mortgage, exceeded its value, remained unforcedclosed, and no interest thereon remained unpaid for more than thirty days after due, "and so long as no taxes or assessments on the said premises remain unpaid and in arrears for more than thirty days." Through the failure, but not willful neglect, of the mortgagor's agent, with whom, she being absent, she had left money sufficient to make payment, a sewer assessment remained unpaid for more than thirty days. But upon learning this fact the mortgagor promptly paid the assessment the day before the summons was served upon her in an action to foreclose the

mortgage. *Held*, that she should be relieved from the consequences of her default in the payment of the assessment. *Noyes v. Anderson*, 687.
 See HUSBAND AND WIFE, 12; INJUNCTIONS; JUDGMENTS, 12, 19.

ERROR.

See APPEAL AND ERROR.

ESTATES OF DECEDENTS.

See EJECTMENTS AND ADMINISTRATORS.

ESTOPPEL.

See HOMESTEAD, 5; PARTITION, 3; RAILROAD COMPANIES, 2.

EVIDENCE.

1. EVIDENCE, ADMISSIBILITY OF, FOR PURPOSE OF IMPRACHMENT OR TO ESTABLISH NEGLIGENCE. — In an action against a railroad company to recover for personal injury to a boy fourteen years of age, not a trespasser, and conclusively shown to have been injured because of a defective railroad platform, by means of which he was thrown under a moving train and crushed, evidence on the part of the defense that such boy was in the habit of jumping on moving trains at that place, and had been warned of the danger, is incompetent to contradict his testimony as to the manner in which he received the injury, or to show that it was caused through his negligence. *Louisville etc. R. R. Co. v. Berry*, 329.
2. NEGLIGENCE. — In an action to recover damages against a railroad company for personal injury received through its negligence, evidence that plaintiff's nervous prostration in consequence of the injury had a weakening effect upon her system, and required the administration of opiates, from which she was acquiring the opium habit; that she did not now and never will take the pleasure previously taken by her in her household duties; and that from the effects of the nervous prostration, she has no energy to work or to enjoy society, — is admissible, not as an element of damages, but as an index to the pain and suffering of the plaintiff. *Chattanooga etc. R. R. Co. v. Liddell*, 169.
3. DECLARATIONS OF A TESTATOR OR A DONOR are admissible in evidence, not for the purpose of establishing the truth of his statements, but merely to show the condition of his mind; and they are admissible for this latter purpose only when they are sufficiently near in point of time to be of some value in determining his mental condition when he did some act which is assailed for his want of capacity. *Lane v. Moore*, 430.
4. WHETHER DECLARATIONS MADE BY A DONOR OR TESTATOR are sufficiently near in point of time to warrant their being submitted to a jury, as tending to show his mental condition when he did some act which is questioned on the ground of his incapacity, rests chiefly in the discretion of the presiding judge. Generally, his determination of this preliminary question must be accepted as conclusive, where it is not shown that he has misapplied any principle of law. *Id.*
5. DECLARATIONS. — Where defendant claimed that a note was given him in the month of August by the holder, who was then nearly eighty-four years of age, and whose business adviser and manager defendant was, it is competent, in an action by an administrator of the donor

to recover the note on the ground that it was procured by fraud and undue influence, to prove declarations of the donor, in the months of September and November, after making the alleged gift, inconsistent with his having made the gift, and denouncing defendant as a rascal, where the purpose for which the declarations are claimed to be offered is to show the mental condition of the donor at the time of the alleged gift. *Id.*

6. **DECLARATIONS AS PART OF RES GESTÆ.** — In an action against a railroad company to recover for personal injury, the declarations of the president of a construction company which was building and equipping the road, made two or three hours after the accident, and at another place, to a newspaper reporter, that it would be to his interest not to publish too much, that the road had been laid temporarily, that he had not had time to put the broad-gauge ties upon it, and that he did not want public opinion too strong against him, are not admissible. *Chattanooga etc. R. R. Co. v. Liddell*, 169.
7. **JURY AND JURORS — EVIDENCE TO ESTABLISH SICKNESS OF JUROR.** — A letter purporting to have been written by a sick juror to the trial judge is not admissible in evidence to establish the sickness, in the absence of any preliminary proof of the genuineness of such letter. *State v. Smith*, 266.
8. **SECONDARY EVIDENCE, WHEN ADMISSIBLE TO SHOW CONTENTS OF WRITING.** — If a replevin bond which forms the basis of a suit on a judgment is not within the jurisdiction of the courts of the state, secondary evidence of its contents is admissible. *Knickerbocker v. Wilcox*, 596.
9. **MORTGAGES — ASSIGNMENT OF PART INTEREST IN MORTGAGE CANNOT BE VARIED BY PAROL.** — A sale and assignment of two of three mortgage notes and of a corresponding interest in the mortgage, containing no mention of priority of lien, cannot be varied by parol evidence to show an oral agreement that the assignee was to have a prior lien under the mortgage as security for the payment of his notes. *Jennings v. Moore*, 601.
10. **CONTRACTS, PAROL EVIDENCE TO VARY.** — Where a contract is in writing, and specially exempts one of the parties from the performance of certain duties, parol evidence is inadmissible to show a parol agreement inconsistent with the written one. *Stanton v. New York etc. R'y Co.*, 110.
11. **CONTRACTS, EVIDENCE TO REBUT.** — An unsigned memorandum of an agreement drawn previous to the contract sued on is not admissible as rebutting evidence. *Wilbur v. Storpel*, 568.
12. **PROMISSORY NOTE — PAROL EVIDENCE TO EXPLAIN.** — Where a note reads, "We promise to pay to the order of myself," and is signed by two obligors, parol evidence is admissible to show which of the two obligors was intended as the payee. *Jenkins v. Bass*, 344.
13. **EVIDENCE TO SHOW NOTE TO BE MERELY ADVANCEMENT BETWEEN PARENT AND CHILD.** — An absolute promise in the form of a note to pay a certain sum of money, given by a child to a parent, may be shown by parol evidence to be intended between the parties to it as a mere receipt or memorandum to show that the parent has made an advancement of that amount to his child, and that it was the intention of the parent that it should never be collected. *Brook v. Latimer*, 292.
14. **PAROL EVIDENCE TO EXPLAIN WRITING.** — The admission of parol evidence tending to show that a promissory note absolute in terms, and given by a child to its parent, is merely intended as between the parties as an advancement by the parent to the child, is not a violation of the rule of

evidence which forbids a written instrument to be varied or contradicted by parol. *Id.*

15. **CONTRACTS — PAROL EVIDENCE TO SHOW EXECUTION.**— Conversations and negotiations preliminary to a written agreement, although merged in it, may still be admissible, not to explain its terms, but to throw light upon the question of its execution, or other questions connected therewith. *Wilbur v. Stoepel*, 568.

See APPEAL AND ERROR, 3, 4; CONTRACTS, 2, 8; CORPORATIONS, 28; CRIMINAL LAW; GIFTS, 1; INSURANCE, 18; LIBEL AND SLANDER, 17-22; MARRIAGE AND DIVORCE, 1-4; PARTNERSHIP, 1; PLEADING, 2, 3; WILLS.

EXECUTIONS.

1. **PROPERTY SUBJECT TO. — AFTER THE DEFAULT OF A MORTGAGOR OF CHATTELS**, he has no interest in the mortgaged property subject to execution against him. *Leadbetter v. Leadbetter*, 733.
2. **TRUST PROPERTY, WHEN NOT SUBJECT TO.** — If the income of a fund is vested in A, provided that B shall be entitled to support therefrom as long as she shall remain a widow, the interest of B cannot be reached by a bill in equity and applied to the payment of her creditors. Her interest is not alienable, because if any part of her interest were given to her alienee, it would not be applied to her support. *Slattery v. Wason*, 448.
3. **TERMINATION OF TIME FOR ISSUING EXECUTION IN FORECLOSURE SUITS.** — If a statute limits the time within which execution may issue in cases for the recovery of money to five years after the entry of judgment, no execution can issue after that time under a decree foreclosing a mortgage, though it specially provides that no judgment shall be docketed for any deficiency should the proceeds of the sale be insufficient to pay the amount found due. *Jacks v. Johnston*, 50.
4. **TIME WITHIN WHICH EXECUTION MAY ISSUE IS NOT EXTENDED** by an order staying proceedings. *Cortez v. Superior Court*, 37.
5. **ORDER DIRECTING EXECUTION TO ISSUE AFTER THE LAPSE OF THE TIME** within which the statute declares it may be issued is in excess of the jurisdiction of the court. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; HOMESTEAD, 7; RECEIVERS; TAXATION.

EXECUTORS AND ADMINISTRATORS.

1. **CONFLICT OF LAWS — ESTATES OF DECEDENTS — LIABILITY OF EXECUTOR FOR ASSETS IN A FOREIGN COUNTRY.** — If an executor in this state is also ancillary administrator in a foreign country, and, as such, has within his control personal assets in such country, which he refuses or willfully neglects to bring into this, he may be charged therewith in the settlement of his accounts in this state. *In re Ortiz*, 44.
2. **ID. — IT IS THE DUTY OF A DOMICILIARY EXECUTOR** to gather in and account for foreign assets of his testator, to the extent of his ability to do so, and the court of the domicile may compel him to account for his willful neglect to perform such duty. *Id.*
3. **ID. — IF THE ESTATE OF A DECEDENT IS SITUATE IN TWO OR MORE COUNTRIES**, and his executor incurs expenses of administration, they should be paid out of that part of the estate in the administration

of which they were incurred, and not out of the part of the estate situated in another country. *Id.*

4. **DECEASED CONTRACTOR—RIGHT TO SHARE IN PROFITS.**—If several persons secure and enter into a contract for the doing of work, and commence its performance, and then one of them dies, and the others perform the contract, they must account to the representatives of their deceased fellow-contractor for his share of the profits. *Jepson v. Killian*, 508.
5. **ELECTION BY WIDOW IN IGNORANCE OF FACTS NOT BINDING.**—Under a statute allowing the widow to take under her husband's will, or to elect to repudiate it and take under the intestate law, an election by her to take under the will, made in ignorance of the facts, and of her rights and of the relative values of the properties between which she may choose, is not binding upon her, especially if made shortly after her husband's death. *Estate of Woodburn*, 932.
6. **INCOME, WHEN PASSES TO TENANT FOR LIFE.**—Where a testator has made a lease of his land for oil purposes prior to his death, under a lease providing that he shall receive a definite portion of the oil produced, and in his will has bequeathed the income of his estate to tenants for life, his share of the oil produced after his death is income, to which the tenants for life are entitled as such. *Id.*
7. **ELECTION BY WIDOW, allowed by statute, is a right to choose between** abiding by her husband's disposition of his property or the right to disregard it and claim under the intestate law. These rights are inconsistent with each other, and cannot co-exist. She must choose one or the other, and cannot choose both; nor does her right of choice depend in any degree on the mention or omission of her in her husband's will, or on the *quantum* of benefit she receives or renounces under it. *Estate of Cunningham*, 901.
8. **ELECTION BY WIDOW.**—Where the husband's will directs a conversion of his real estate into personalty, and the wife elects to take under the intestate law, her rights are fixed irrespective of the will, and she cannot claim that the conversion operates so as to entitle her to one half of the fund absolutely; for, as to her, the fund must be regarded as real estate, and she is only entitled to a half-interest therein for life. *Id.*
9. **Widow's right of election, given by statute, is paramount to her husband's power of disposition by will, and if she elects to disregard the latter, she can claim her statutory estate in the land itself, and at law it is that only to which she is entitled; but in equity, if she has acquiesced in a sale made under the will, and made claim to the proceeds, she thereby relinquishes her dower, and the land passes to the purchaser discharged of her estate in it. The fund, however, arising from the sale is still treated as realty as to her, and she is entitled to a half-interest therein for life. *Id.***
10. **ELECTION BY WIDOW.**—The question whether a widow filed a formal paper, electing to take against the will, voluntarily or under stress of an order of court, is entirely immaterial to her rights. Such writing is unimportant, except as evidence. *Id.*
11. **ESTATES OF DECEDENTS—CONFIRMATION OF, IS INDISPENSABLE.**—A sale, by the orphans' court, of the estate of a decedent for the payment of debts, does not divest the title of the heirs until after confirmation thereof, and the execution and delivery of a deed by order of the court; and until such deed is delivered, an heir or his vendee may maintain ejectment against the purchaser at such sale, even though the latter has paid the

purchase-money and has gone into possession. *Greenough v. Small*, 859.

See APPEAL AND ERROR, 1; HOMESTEAD, 8; JUDGMENTS, 19; PERSONAL PROPERTY.

EXEMPTIONS.

See ATTACHMENT AND GARNISHMENT; EXECUTION; HOMESTEAD.

FALSE PRETENSES.

See CRIMINAL LAW, 6.

FENCES.

See NUISANCES, 1.

FIXTURES.

FACTORY AND ITS EQUIPMENTS MAY BE PERSONAL PROPERTY WHEN. — A factory with its equipments, though it is affixed to the soil, may have impressed upon it the character of personal property by the acts and conduct of parties dealing with it as mortgagees and owners, and this character, when once impressed upon it, will be retained, unless by decree it is transformed into real property. *Horn v. Indianapolis Nat. Bank*, 231.

FORECLOSURE.

See MORTGAGES.

FORFEITURES.

See EQUITY; INSURANCE, 7, 8; LANDLORD AND TENANT, 1-2.

FORGED CHECKS.

See BANKS AND BANKING, 1-4.

FORMER ACTION.

See ABATEMENT, 1.

FRAUD.

JUDGMENTS, PROCUREMENT OF, BY FRAUD, IS QUESTION OF FACT. — A claim that a judgment rendered in another state was procured by fraud and collusion presents a question of fact to be determined by the jury, under proper instruction. *Knickerbocker v. Wilcox*, 595.

See AGENCY, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1-3; CORPORATIONS, 23; CRIMINAL LAW; SALES, 16.

FRAUDULENT CONVEYANCES.

EVIDENCE OF INTENT. — Where a sale of personal property is attacked as having been made with intent to hinder, delay, and defraud creditors, the seller may testify as to whether or not such was his intent in making the sale. *Gardom v. Woodward*, 310.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2, 3; CHATTEL MORTGAGES, 1-4; HUSBAND AND WIFE, 2-12; SALES.

- of which they were incurred, and not out of the part of the estate situated in another country. *Id.*
4. **DECEASED CONTRACTOR — RIGHT TO SHARE IN PROFITS.** — If several persons secure and enter into a contract for the doing of work, and commence its performance, and then one of them dies, and the others perform the contract, they must account to the representatives of their deceased fellow-contractor for his share of the profits. *Jepson v. Killian*, 508.
 5. **ELECTION BY WIDOW IN IGNORANCE OF FACTS NOT BINDING.** — Under a statute allowing the widow to take under her husband's will, or to elect to repudiate it and take under the intestate law, an election by her to take under the will, made in ignorance of the facts, and of her rights and of the relative values of the properties between which she may choose, is not binding upon her, especially if made shortly after her husband's death. *Estate of Woodburn*, 932.
 6. **INCOME, WHEN PASSES TO TENANT FOR LIFE.** — Where a testator has made a lease of his land for oil purposes prior to his death, under a lease providing that he shall receive a definite portion of the oil produced, and in his will has bequeathed the income of his estate to tenants for life, his share of the oil produced after his death is income, to which the tenants for life are entitled as such. *Id.*
 7. **ELECTION BY WIDOW, allowed by statute, is a right to choose between** abiding by her husband's disposition of his property or the right to disregard it and claim under the intestate law. These rights are inconsistent with each other, and cannot co-exist. She must choose one or the other, and cannot choose both; nor does her right of choice depend in any degree on the mention or omission of her in her husband's will, or on the quantum of benefit she receives or renounces under it. *Estate of Cunningham*, 901.
 8. **ELECTION BY WIDOW.** — Where the husband's will directs a conversion of his real estate into personalty, and the wife elects to take under the intestate law, her rights are fixed irrespective of the will, and she cannot claim that the conversion operates so as to entitle her to one half of the fund absolutely; for, as to her, the fund must be regarded as real estate, and she is only entitled to a half-interest therein for life. *Id.*
 9. **Widow's right of election, given by statute, is paramount to her husband's power of disposition by will, and if she elects to disregard the latter, she can claim her statutory estate in the land itself, and at law it is that only to which she is entitled; but in equity, if she has acquiesced in a sale made under the will, and made claim to the proceeds, she thereby relinquishes her dower, and the land passes to the purchaser discharged of her estate in it. The fund, however, arising from the sale is still treated as realty as to her, and she is entitled to a half-interest therein for life.** *Id.*
 10. **ELECTION BY WIDOW.** — The question whether a widow filed a formal paper, electing to take against the will, voluntarily or under stress of an order of court, is entirely immaterial to her rights. Such writing is unimportant, except as evidence. *Id.*
 11. **ESTATES OF DECEDENTS — CONFIRMATION OF, IS INDISPENSABLE.** — A sale, by the orphans' court, of the estate of a decedent for the payment of debts, does not divest the title of the heirs until after confirmation thereof, and the execution and delivery of a deed by order of the court; and until such deed is delivered, an heir or his vendee may maintain ejectment against the purchaser at such sale, even though the latter has paid the

purchase-money and has gone into possession. *Greenough v. Small*, 859.

See APPEAL AND ERROR, 1; HOMESTEAD, 8; JUDGMENTS, 19; PERSONAL PROPERTY.

EXEMPTIONS.

See ATTACHMENT AND GARNISHMENT; EXECUTION; HOMESTEAD.

FALSE PRETENSES.

See CRIMINAL LAW, 6.

FENCES.

See NUISANCES, 1.

FIXTURES.

FACTORY AND ITS EQUIPMENTS MAY BE PERSONAL PROPERTY WHEN. — A factory with its equipments, though it is affixed to the soil, may have impressed upon it the character of personal property by the acts and conduct of parties dealing with it as mortgagees and owners, and this character, when once impressed upon it, will be retained, unless by decree it is transformed into real property. *Horn v. Indianapolis Nat. Bank*, 231.

FORECLOSURE.

See MORTGAGES.

FORFEITURES.

See EQUITY; INSURANCE, 7, 8; LANDLORD AND TENANT, 1-3.

FORGED CHECKS.

See BANKS AND BANKING, 1-4.

FORMER ACTION.

See ABATEMENT, 1.

FRAUD.

JUDGMENTS, PROCUREMENT OF, BY FRAUD, IS QUESTION OF FACT. — A claim that a judgment rendered in another state was procured by fraud and collusion presents a question of fact to be determined by the jury, under proper instruction. *Knickerbocker v. Wilcox*, 595.

See AGENCY, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1-3; CORPORATIONS, 23; CRIMINAL LAW; SALES, 16.

FRAUDULENT CONVEYANCES.

EVIDENCE OF INTENT. — Where a sale of personal property is attacked as having been made with intent to hinder, delay, and defraud creditors, the seller may testify as to whether or not such was his intent in making the sale. *Gardom v. Woodward*, 310.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2, 3; CHATTEL MORTGAGES, 1-4; HUSBAND AND WIFE, 2-12; SALES.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GIFTS.

1. GIFT CAUSA MORTIS — EVIDENCE. — Where the fact of a gift *causa mortis* is testified to by the donee or a member of his family, a writing executed by the donor a few days before making the alleged gift is admissible as corroborative evidence, if it shows an intention to give, and thus corroborates the evidence of a gift subsequently made. *Ridden v. Thrall*, 758.
2. GIFT CAUSA MORTIS OF MONEY DEPOSITED IN BANK may be consummated by a delivery to the donee of the bank-book representing the deposits, though the corporation with which the deposits were made had adopted a by-law declaring that drafts may be made personally, or by an order in writing by the depositor, or by his power of attorney, duly authenticated, and that any one presenting such order or power of attorney must be known, or made known, as one authorized to receive the money. *Id.*
3. GIFT CAUSA MORTIS MAY BE MADE BY ONE IN APPREHENSION OF DEATH FROM A SURGICAL OPERATION to which he intends voluntarily to expose himself, if such operation is made necessary by a present disease. *Id.*
4. GIFT CAUSA MORTIS MUST BE IN APPREHENSION OF SOME PRESENT DISEASE or some other impending peril, and becomes void upon recovery from the disease or escape from the peril. *Id.*
5. GIFT CAUSA MORTIS NEED NOT BE MADE IN EXTREME, when there is no time or opportunity to make a will. *Id.*
6. GIFT CAUSA MORTIS WHEN DEATH DID NOT RESULT FROM THE DISEASE OR PERIL APPREHENDED. — If a gift *causa mortis* is made in view of the peril of a surgical operation to which the donor is about to submit, and he, after submitting to the operation, and before his recovery therefrom, dies from another disease or cause, the gift is valid. It is true that such a gift becomes inoperative if the donor recovers from the disease or escapes the peril in contemplation when it was made; but if he does not recover, the gift is good, though his death results from a cause not apprehended by him. *Id.*

See EVIDENCE, 3-5.

GROWING CROPS.

See MARRIAGE AND DIVORCE, 7.

GUARANTY.

See NEGOTIABLE INSTRUMENTS, 13; SURETYSHIP.

HIGHWAYS.

See ANIMALS; RAILROAD COMPANIES, 4-8.

HOMESTEAD.

1. SUFFICIENCY OF SURVEYOR'S AFFIDAVIT OF PLAT OF. — The surveyor's affidavit that the plat "is a correct plat" means, in substance, that the land is correctly platted and laid off, and is a sufficient affidavit under section 2008 of the Georgia code. *Timothy v. Chambers*, 163.
2. REGISTRATION OF PLAT OF. — The law does not require the plat to be recorded in the county in which the land lies, but only in the county in

which the jurisdiction to secure the homestead is exercised: Georgia code, section 2009. *Id.*

3. **PRESUMPTION IN FAVOR OF REGULARITY OF PROCEEDINGS TO OBTAIN.** — Liberal presumptions are indulged in favor of the regularity of homestead proceedings. A proper order to the surveyor will be presumed, where the ordinary has approved the plat returned to him; and approval of the "homestead" means, substantially, approval of the plat and the schedule conformably to section 2009 of the Georgia code. *Id.*
4. **SOLD WITHOUT LEAVE MAY BE RECOVERED THOUGH PROCEEDS ENJOYED — MEANE PROFITS SET OFF.** — Where husband and wife sold and conveyed homestead land secured under the constitution of 1868, with no leave so to do, that the beneficiaries of the homestead used and enjoyed the proceeds of the sale will not bar a recovery of the land, but money thus used and enjoyed may be set off against meane profits for which the purchaser is liable. *Id.*
5. **SOLD WITHOUT LEAVE MAY BE RECOVERED — WIFE'S WARRANTY DEED NOT ESTOPPEL.** — The wife's deed, with or without warranty, if it has no effect as a conveyance of title, will not estop her as to her interest in the homestead premises in an action to recover the land on the homestead right. Though she may be bound to respond to her warranty, her own property, not the homestead itself, must be looked to for satisfaction. *Id.*
6. **ON THE DEATH OF A HUSBAND,** community property of himself and his wife, held by them as their homestead, vests in her, and is protected as her homestead to the same extent as before his death. *Sanders v. Russell*, 26.
7. **JUDGMENT AND EXECUTION LIEN UPON HOMESTEAD.** — Though a homestead is in value largely in excess of the amount allowed by law, the levy of an execution upon it does not create any lien. Its operation is confined to serving as a foundation for proceedings under the statute for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment. *Id.*
8. **ESTATES OF DECEDENTS, PRESENTATION OF CLAIMS AGAINST.** — If one has a judgment against the estate of a decedent, under which a levy has been made on a homestead in his lifetime, the plaintiff must present his claim upon such judgment to the administrator and procure its allowance, and is not entitled to proceed to have the homestead appraised and sold or partitioned, and the excess above the amount of the homestead exemption applied to the payment of the judgment. *Id.*

HOMICIDE.

See CRIMINAL LAW, 16-26.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE MAY MAINTAIN JOINT ACTION FOR BREACH OF CONTRACT OF BAILMENT WHEN.** — Where a husband and wife enter into a contract of bailment with a person, and compensate him for such bailment, they are entitled to maintain a joint action against him for a breach of such contract. And while in such an action the matters charged in the complaint partake largely of the nature of a tort, yet if

they are so intimately connected with the contract of bailment, also alleged in the complaint, as to be incapable of separation from it, this will constitute such a unity of interest in such husband and wife as will give them the joint right to maintain the action. *Remick v. Wright*, 249.

2. CONVEYANCES BETWEEN. — Husband and wife may, during coverture, make contracts for the conveyances of property between themselves which are valid in equity; and although they will be examined with great care, they will always be upheld when found to contain the essential requisites. *Hausman v. Burnham*, 74.
3. *Id.* — CONSIDERATION. — A promise by a married woman to reconvey certain property to her husband upon his request, in consideration of his conveyance of the same to her through a third person, and reserving to the husband a life use therein, is based upon a valuable and adequate consideration, and is enforceable in equity. *Id.*
4. *Id.* — A contract of a married woman with her husband, for the benefit of herself or her estate, is binding in equity, and the estate affected thereby need not be held by her to her sole and separate use. *Id.*
5. *Id.* — STATUTE OF FRAUDS. — If a married woman contracts to reconvey certain property to her husband upon his request, in consideration of his conveyance of the same to her through a trustee, the statute of frauds does not apply. Such contract need not be in writing, as part of it has been fully performed by one of the contracting parties, nor is it objectionable because not to be performed within a year, when no time for performance is stipulated. *Id.*
6. *Id.* — MISTAKE. — Where a married woman agrees to reconvey property to her husband upon his request, in consideration of a conveyance of the same to her, but the husband fails to join the wife in such reconveyance, owing to the erroneous advice of his counsel, equity will relieve against the legal mistake, and order a reconveyance, unless there are substantial reasons to the contrary. *Id.*
7. *Id.* — WAIVER. — Where a wife agrees to reconvey property to her husband upon his request, in consideration of his conveyance of the same to her, her subsequent consent and attempt to reconvey constitute a waiver of a former request to reconvey, and such waiver attaches to those who claim under or through her. *Id.*
8. *Id.* — DUTY OF HEIRS TO RECONVEY. — Where a wife promises to reconvey property to her husband upon his request, in consideration of his conveyance of the same to her, the liability to reconvey at any time upon request constitutes an equity which attaches to it while in her hands, and her heirs take and hold it subject to the same equity, which can be enforced against them to the same extent that it might have been enforced against her during her lifetime. *Id.*
9. *Id.* — PAROL PROOF OF CONSIDERATION. — Where the real consideration for a conveyance from husband to wife is different from that expressed in the deed, it may be shown by parol, and the variance does not impair the validity or change the effect of the conveyance. *Id.*
10. *Id.* — PROMISE TO RECONVEY. — Where a wife promises to reconvey certain property to her husband upon his request, in consideration of a conveyance of the same to her, reserving the use of a life estate in the property to him, the promise to reconvey is not inconsistent with the interest in the premises reserved in the deed to her. *Id.*
11. CONVEYANCES BETWEEN, WHETHER VOLUNTARY. — Where a wife agrees to reconvey property to her husband upon his request, in consideration

- of his conveyance of the same to her, such reconveyance is not voluntary so as to prevent equity from enforcing it, in the absence of proof of her indebtedness, or that creditors were defrauded or prejudiced. *Id.*
12. CONVEYANCES BETWEEN — ENFORCEMENT OF PROMISE TO RECONVEY. — Where a married woman promises to reconvey property to her husband upon his request, in consideration of his conveyance of the same to her, equity will enforce such promise, although she has made an ineffectual attempt to reconvey. *Id.*
13. BOND TO HUSBAND FOR WIFE'S SEPARATE SUPPORT INVALIDATED BY HER RETURN TO HIM. — Where a person gives to a husband, whose wife has left him and commenced an action against him for a limited divorce and for support, a bond conditioned that he will support the wife and save the husband from all further liability therefor, he is not liable on such bond for money paid by the husband for necessaries supplied to the wife after she returns to her husband and permanently resumes her membership of his family as his wife, even though the reconciliation be not wholly complete nor the conjugal relation entirely restored. Such return and resumption put an end to the contract represented by the condition of the bond. *Zimmer v. Settle*, 638.
14. SEPARATE PROPERTY. — If a married woman purchases property which is, at the time, intended to be her separate estate, and her husband loans her money to be used in making a partial payment, he does not, nor does the community, acquire an interest in the property proportionate to the moneys so loaned by him, nor to any other extent. He is simply a creditor of his wife to the amount of the loan. *Flournoy v. Flournoy*, 39.
15. IN. — If a wife purchases property, paying therefor partly out of her separate estate and partly with moneys borrowed on the faith of her existing property, and secured by a mortgage thereon, in which and the note which it is given to secure the husband also joins, the whole purchase is her separate estate. *Id.*
16. IN. — Where property is purchased as the separate estate of a married woman, and intended, at the time of purchase, both by her and her husband, to be hers, the fact that he subsequently, without her knowledge or consent, paid an unpaid balance of the purchase price cannot prevent the entire property from being her separate estate. *Id.*
17. ID. — When the question of the effect of a conveyance to a married woman is involved, the intention of the parties is of paramount importance; and if, as between the husband and wife, it was intended to vest the property in her as her separate estate, the courts will respect that intention and declare the property to be hers, though but for such intention the title would vest in the community. *Id.*

See HOMESTEAD.

IGNORANCE

See ABATEMENT, 2.

IMPROVEMENTS.

See MORTGAGES, 7.

INCEST.

See CRIMINAL LAW, 7-11.

15. NOTICE TO AN ORDINARY INSURANCE BROKER is not notice to the insurer. *Id.*
16. INSURANCE BROKER IS ONE WHO ACTS AS A MIDDLEMAN between the assured and the company, and who solicits insurance from the public under no employment from any special company, but having secured an order, he either places the insurance with a company selected by the assured, or in the absence of any selection by him, then with a company selected by such broker. If he enters into the exclusive employment of the insurer or his agent, he loses his character as an insurance broker, and becomes a mere clerk or employee, and any notice which could be given to a clerk or employee can be given to him. *Id.*
17. NOTICE OF ADDITIONAL INSURANCE is sufficient if given to one in the employment of an agent to whom such notice might properly have been given, where such employee solicited the original insurance, occupies a desk in the office of such agent, and his duties are to solicit insurance for the exclusive benefit of such agent, and to take to him all risks secured. *Id.*
18. EVIDENCE. — When it is claimed in an action on a policy of insurance that a notice of additional insurance was given to a clerk of an agent of the insurer, and that its being so given was sufficient to comply with the policy, evidence is admissible which tends to show that the agents employed clerks who were in the habit of attending to the details of the business and of signing consents for additional insurance. *Id.*
19. WITNESSES — PROPER CROSS-EXAMINATION. — An insurance agent who has received the check of the insured for the premium due on a policy, after a loss has occurred, and has held it for two weeks without objection, and without presenting it for payment, and who has testified that there was no agreement between the company and the insured that the latter should have time in which to pay the premium, may be asked, on cross-examination, whether or not, if there had been no loss, he would have insisted upon the payment of the check. *Long v. North British etc. Ins. Co.*, 879.
20. OFFER OF COMPROMISE — WAIVER. — An offer to compromise a loss for half the amount due on a policy of insurance, made by a general adjuster without authority to waive or alter any of the terms of policies, and without any admission of liability on the part of the company, does not constitute a waiver of the right to forfeit the policy under a clause providing for forfeiture in case the premises shall become vacant and unoccupied. *Richards v. Continental Ins. Co.*, 611.
21. OCCUPANCY OF DWELLING. — An insured dwelling which has been abandoned as a dwelling two days before its loss by fire, and with no intention to return, is, in law, vacant, within the meaning of an insurance policy providing that it shall be void if at any time the house shall become vacant or unoccupied. *Id.*
22. CERTIFICATE OF MEMBERSHIP OF MUTUAL BENEFIT SOCIETY IS CONTRACT OF INSURANCE. — The certificate of membership issued to a member of a mutual benefit society is a contract of insurance, and his right to recover upon it does not depend upon the action of the officers of the society, for if he has performed his part of the contract and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow the claim will not defeat a recovery. *Supreme Council v. Foretnger*, 196.

23. **COMPLAINT AGAINST MUTUAL BENEFIT SOCIETY ON CERTIFICATE, WHEN SUFFICIENT.** — In an action upon a certificate of membership of a mutual benefit insurance society, it is sufficient for the plaintiff in his complaint to allege the contract with the corporation, performance of the conditions on his part, that he has been totally disabled, and that he has made proper proof of his disability. He is not bound to allege that his proofs are such as satisfied the corporate officers. *Id.*
24. **ARBITRARY REJECTION OF CLAIMANT'S PROOFS BY OFFICERS OF MUTUAL BENEFIT SOCIETY INEFFECTUAL.** — While a member of a mutual benefit society is bound to comply with the requirements of the valid by-laws of the association, the officers cannot defeat his claim by arbitrarily rejecting his proofs as unsatisfactory, or by wrongfully declaring that he had not done what his contract and the by-laws of the association required of him. *Id.*
25. **MUTUAL BENEFIT SOCIETY MAY PROVIDE FOR PRESENTATION OF CLAIMS TO ITS OFFICERS.** — It is competent for a mutual benefit society to provide for the presentation of claims to officers designated in its by-laws, and it may also prescribe a mode of procedure, provided such mode is not such as to deprive parties of property rights. *Id.*
26. **BY-LAW OF BENEFIT SOCIETY REQUIRING APPEAL TO GOVERNING BODY VALID.** — A by-law of a mutual benefit society requiring the presentation of claims for benefits to be made to its subordinate officers, and requiring, in case of a decision by them adverse to the claimant, an appeal to the governing body of the society, is reasonable and valid, notwithstanding an attempt to make the decision conclusive is abortive. The provision attempting to make the decision of the governing body final and conclusive is so distinct and different from the provisions concerning appeals that its invalidity does not destroy their force. *Id.*
27. **FAILURE TO APPEAL TO GOVERNING BODY OF BENEFIT SOCIETY ABATES ACTION.** — In an action by a certificate-holder against a mutual benefit society whose by-laws require an appeal to the governing body, an answer, alleging the failure of the plaintiff to make such appeal before bringing the action, is good as a plea in abatement. *Id.*

See **CONTRACTS**, 7.

INSTRUCTIONS.

See **APPEAL AND ERROR**, 2; **CRIMINAL LAW**, 17-19; **TRIAL**, 5-8.

I O U.

See **INTEREST**, 1; **NEGOTIABLE INSTRUMENTS**, 3.

INTEREST.

1. In general, where there is a loan without any stipulation to pay interest, and where one owes money to another, having been guilty of no wrong in obtaining and no default in retaining it, interest is not chargeable. Therefore interest cannot be collected on an I O U, where there has been no demand for its payment. *Gay v. Rooke*, 434.
2. **RULE FOR COMPUTING.** — In case of partial payments, interest should be computed by applying the payment in discharge of the matured interest, and the surplus, if any, upon the principal, after which interest should be computed on the principal remaining due. If the payment is less than the interest, the surplus thereof must not be added to the principal, *AM. ST. REP.*, VOL. XXI — 62.

15. NOTICE TO AN ORDINARY INSURANCE BROKER is not notice to the insurer. *Id.*
16. INSURANCE BROKER IS ONE WHO ACTS AS A MIDDLEMAN between the assured and the company, and who solicits insurance from the public under no employment from any special company, but having secured an order, he either places the insurance with a company selected by the assured, or in the absence of any selection by him, then with a company selected by such broker. If he enters into the exclusive employment of the insurer or his agent, he loses his character as an insurance broker, and becomes a mere clerk or employee, and any notice which could be given to a clerk or employee can be given to him. *Id.*
17. NOTICE OF ADDITIONAL INSURANCE is sufficient if given to one in the employment of an agent to whom such notice might properly have been given, where such employee solicited the original insurance, occupies a desk in the office of such agent, and his duties are to solicit insurance for the exclusive benefit of such agent, and to take to him all risks secured. *Id.*
18. EVIDENCE. — When it is claimed in an action on a policy of insurance that a notice of additional insurance was given to a clerk of an agent of the insurer, and that its being so given was sufficient to comply with the policy, evidence is admissible which tends to show that the agents employed clerks who were in the habit of attending to the details of the business and of signing consents for additional insurance. *Id.*
19. WITNESSES — PROPER CROSS-EXAMINATION. — An insurance agent who has received the check of the insured for the premium due on a policy, after a loss has occurred, and has held it for two weeks without objection, and without presenting it for payment, and who has testified that there was no agreement between the company and the insured that the latter should have time in which to pay the premium, may be asked, on cross-examination, whether or not, if there had been no loss, he would have insisted upon the payment of the check. *Long v. North British etc. Ins. Co.*, 879.
20. OFFER OF COMPROMISE — WAIVER. — An offer to compromise a loss for half the amount due on a policy of insurance, made by a general adjuster without authority to waive or alter any of the terms of policies, and without any admission of liability on the part of the company, does not constitute a waiver of the right to forfeit the policy under a clause providing for forfeiture in case the premises shall become vacant and unoccupied. *Richards v. Continental Ins. Co.*, 611.
21. OCCUPANCY OF DWELLING. — An insured dwelling which has been abandoned as a dwelling two days before its loss by fire, and with no intention to return, is, in law, vacant, within the meaning of an insurance policy providing that it shall be void if at any time the house shall become vacant or unoccupied. *Id.*
22. CERTIFICATE OF MEMBERSHIP OF MUTUAL BENEFIT SOCIETY IS CONTRACT OF INSURANCE. — The certificate of membership issued to a member of a mutual benefit society is a contract of insurance, and his right to recover upon it does not depend upon the action of the officers of the society, for if he has performed his part of the contract and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow the claim will not defeat a recovery. *Supreme Council v. Foreinger*, 196.

23. COMPLAINT AGAINST MUTUAL BENEFIT SOCIETY ON CERTIFICATE, WHEN SUFFICIENT. — In an action upon a certificate of membership of a mutual benefit insurance society, it is sufficient for the plaintiff in his complaint to allege the contract with the corporation, performance of the conditions on his part, that he has been totally disabled, and that he has made proper proof of his disability. He is not bound to allege that his proofs are such as satisfied the corporate officers. *Id.*
24. ARBITRARY REJECTION OF CLAIMANT'S PROOFS BY OFFICERS OF MUTUAL BENEFIT SOCIETY INEFFECTUAL. — While a member of a mutual benefit society is bound to comply with the requirements of the valid by-laws of the association, the officers cannot defeat his claim by arbitrarily rejecting his proofs as unsatisfactory, or by wrongfully declaring that he had not done what his contract and the by-laws of the association required of him. *Id.*
25. MUTUAL BENEFIT SOCIETY MAY PROVIDE FOR PRESENTATION OF CLAIMS TO ITS OFFICERS. — It is competent for a mutual benefit society to provide for the presentation of claims to officers designated in its by-laws, and it may also prescribe a mode of procedure, provided such mode is not such as to deprive parties of property rights. *Id.*
26. BY-LAW OF BENEFIT SOCIETY REQUIRING APPEAL TO GOVERNING BODY VALID. — A by-law of a mutual benefit society requiring the presentation of claims for benefits to be made to its subordinate officers, and requiring, in case of a decision by them adverse to the claimant, an appeal to the governing body of the society, is reasonable and valid, notwithstanding an attempt to make the decision conclusive is abortive. The provision attempting to make the decision of the governing body final and conclusive is so distinct and different from the provisions concerning appeals that its invalidity does not destroy their force. *Id.*
27. FAILURE TO APPEAL TO GOVERNING BODY OF BENEFIT SOCIETY ABATES ACTION. — In an action by a certificate-holder against a mutual benefit society whose by-laws require an appeal to the governing body, an answer, alleging the failure of the plaintiff to make such appeal before bringing the action, is good as a plea in abatement. *Id.*

See CONTRACTS, 7.

INSTRUCTIONS.

See APPEAL AND ERROR, 2; CRIMINAL LAW, 17-19; TRIAL, 5-8.

I O U.

See INTEREST, 1; NEGOTIABLE INSTRUMENTS, 8.

INTEREST.

1. In general, where there is a loan without any stipulation to pay interest, and where one owes money to another, having been guilty of no wrong in obtaining and no default in retaining it, interest is not chargeable. Therefore interest cannot be collected on an I O U, where there has been no demand for its payment. *Gay v. Rooke*, 434.
2. RULE FOR COMPUTING. — In case of partial payments, interest should be computed by applying the payment in discharge of the matured interest, and the surplus, if any, upon the principal, after which interest should be computed on the principal remaining due. If the payment is less than the interest, the surplus thereof must not be added to the principal, AM. ST. REP., VOL. XXI. — 62.

but interest must be computed on the former principal until the aggregate payments exceed the interest due, when the surplus must be applied toward discharging the principal, after which interest must be computed on the new principal. *Wallace v. Glaser*, 556.

3. **COMPUTATION OF.**—Under a statute allowing interest to be computed upon interest after it matures, such computation can continue only until the debt matures, after which simple interest is to be cast upon the principal until the time of liquidation. *Id.*

JOINT LIABILITY.

RELEASE OF ONE OF TWO JOINT DEBTORS DOES NOT DISCHARGE THE OTHER WHEN.—Where a release of one of two joint debtors expressly provides that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged thereby. The equitable rule which now prevails gives to a release operation according to the intention of the parties and the justice of the case. *Whitemore v. Judd etc. Oil Co.*, 708.

See ASSIGNMENT, 4; NUISANCES, 4.

JUDGMENTS AND DECREES.

1. **JUDGMENT, MERGER BY.**—ONE TORT CAN GIVE BUT ONE CAUSE OF ACTION, though it injures different parcels of property. Hence if a railway is wrongfully constructed and operated along a street in front of two lots situated a short distance from each other, but belonging to the same proprietor, and he brings an action to recover damages occasioned to one lot by the railroad, his claim for damages to both is merged in the judgment, and there can be no further recovery. *Deronio v. Southern Pacific R. R. Co.*, 57.
2. **JUDGMENT, MERGER BY, ON A COLLATERAL SECURITY.**—If the maker of a promissory note agrees to procure an indorser thereof, and fails to do so, and an action is brought against him upon this agreement, and a judgment recovered in which the damages are assessed at a sum equal to the amount due on the note, such judgment, remaining unsatisfied, will not preclude a recovery on the note for the amount thereof. *Vanuzem v. Burr*, 458.
3. **JUDGMENT, MERGER BY.**—IF A PERSON GIVES TWO CONTRACTS, each constitutes a cause of action upon which judgment may be recovered against him, though the satisfaction of one of the judgments may operate as a satisfaction of the other. *Id.*
4. **DECREE DETERMINING CONFLICTING CLAIMS OF TITLE.**—DECREE AGAINST NON-RESIDENT DEFENDANT, based upon service of process by publication, in an action to determine conflicting claims to real property situated within this state, is valid. The state has power to provide for the determination of such claims, and to authorize the service of process on non-resident defendants by the publication thereof. *Parkins v. Wakeham*, 67.
5. **DECREES QUIETING TITLE**, while not strictly *in rem*, partake of the nature of judgments *in rem*, and may, therefore, be supported by the service of process on a non-resident defendant by publication. *Id.*
6. **JUDGMENTS, WHEN BINDING ON NON-RESIDENTS WITHOUT PERSONAL SERVICE.**—An action by a citizen of one state in a court of another state against a citizen of another state, by which plaintiff claims title to an

undivided one-half interest in joint ownership with defendant in a judgment concerning property, rendered in the court where the present suit is brought, but which is pending on writ of error in the supreme court of the United States, is substantially a proceeding *in rem*; and an exception to the jurisdiction of the court *ratione personarum*, tendered by a curator *ad hoc* appointed to represent the absent defendant, on the ground that the latter has not been personally served, is not good. Substituted service by citation is effectual in such case, and the judgment rendered thereon will bind the absent defendant as to the property specially affected thereby. *Young v. Upshur*, 381.

7. **RES JUDICATA.** — The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined are comprehended and involved in the things expressly stated and determined, whether or not they were expressly litigated and considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purposes of the estoppel, deemed to have been actually decided. *Huntley v. Holt*, 71.
8. **Id.** — The only matter essential to making a former judgment on the merits conclusive between the parties is, that the question to be determined in the second action is the same question judicially settled in the first. A judgment is conclusive not only as to the subject-matter in the suit, but as to all other suits which, though concerning other subject-matter, involve the same question in controversy. Accordingly, the record of a finding of indebtedness in favor of a party to one suit is admissible and conclusive in a subsequent suit brought by his assignee to recover the same debt from the same judgment debtor. *Id.*
9. **RES JUDICATA — WRIT OF PROHIBITION.** — When, in an action between mother and son, to which the administrator of the latter is made a party, a deed purporting to have been executed by the mother is adjudged to have been a forgery, such administrator cannot afterwards maintain an action against her attorney to recover damages for his alleged mutilation of the deed. The subject-matter of the latter action is *res judicata*, and a writ of prohibition will lie to stay all proceedings therein. *Bates v. Kelley*, 554.
10. **CONCLUSIVENESS OF, WHEN BASED UPON FALSE RETURN.** — Where plaintiff acts in good faith in obtaining a judgment upon the return of a sheriff, indorsed upon the summons, that it was executed on the defendant, though in fact it was not, the return is conclusive as between the plaintiff and defendant. Such false return, though procured by one of the defendants, and that defendant the husband of the wronged defendant, will not justify setting aside the judgment as against the innocent plaintiff. The remedy is against the wrong-doers to recover damages. *Thomas v. Ireland*, 356.
11. **COLLATERAL ATTACK.** — A judgment against the assignor of an estate for the benefit of creditors, and in favor of a creditor, cannot be collaterally attacked by other creditors on the ground that execution issued thereon prematurely; they can only attack it for fraud and collusion to hinder and delay them. *Estate of Hanika*, 907.
12. **JUDGMENTS, WHEN MAY BE COLLATERALLY ATTACKED.** — A judgment or decree obtained by fraud and collusion of the parties to it, for the pur-

- pose of defrauding a third person, may be attacked by him in a collateral proceeding. *Id.*
13. **JUDGMENTS, WHEN CANNOT BE COLLATERALLY ATTACKED.** — A party who alleges that a judgment has been obtained against him by fraud may attack it directly, by appeal from or by motion to open it, but cannot attack it collaterally in an action to recover money collected by regular process issued upon it. *Id.*
 14. **JUDGMENT ON WARRANT OF ATTORNEY, WHEN CANNOT BE COLLATERALLY ATTACKED.** — A judgment entered on a warrant of attorney is as impervious to collateral attack in an action to recover money collected by regular process issued upon it as is a judgment obtained in open court. *Id.*
 15. **MOTION TO VACATE A JUDGMENT** on the ground that it is void is not a collateral but a direct attack. *Reinhart v. Lugo*, 52.
 16. **JUDGMENT BY DEFAULT ENTERED BY A CLERK IS VOID** when he is not authorized to enter it by statute, as where he acted upon a return of the service of summons not sworn to nor appearing on its face to be an official act. *Id.*
 17. **JUDGMENT BY DEFAULT WHEN THE PROOF OF THE SERVICE OF SUMMONS IS DEFECTIVE IS VOID**, and a motion to vacate it cannot be successfully resisted by proving that the summons was in fact properly served. Such proof cannot operate by relation to make valid a judgment void when it was entered. *Id.*
 18. **RELIEF FROM A JUDGMENT WILL NOT BE GRANTED IN EQUITY** on the ground that the attorneys or their clerk inadvertently omitted to file an undertaking on appeal therefrom, for which omission such appeal was dismissed, and all remedy thereby lost. *Duly v. Pennie*, 61.
 19. **RELIEF FROM A DECREE DISTRIBUTING THE ESTATE** of a decedent will not be granted in equity on the ground that the persons interested did not receive any personal notice of the proceedings, if the statute did not require such notice and there is no allegation that such notice as it did require was not given. *Id.*
 20. **SISTER STATE JUDGMENTS, PRESUMPTION IN FAVOR OF—EVIDENCE TO IDENTIFY.** — Where a judgment record in a suit upon a replevin bond, brought in another state, shows a copy of the bond set out at length in the complaint as the only cause of action relied upon, it will be presumed in support of the judgment that it was rendered after due proof of the execution of the bond declared on. For the purpose of identifying such judgment, parol evidence is admissible. *Knickerbocker v. Wilcox*, 595.
- See **ACTIONS**, 5; **APPEAL AND ERROR**, 5; **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 2; **ATTACHMENT AND GARNISHMENT**, 2, 3; **HOMESTEAD**, 7; **MARRIAGE AND DIVORCE**, 8; **PARTITION**, 4; **PROCESS**, 2; **SHERIFFS**, 2; **STATES**, 1; **STATUTES**, 5; **SURETYSHIP**, 1.

JUDICIAL SALES.

1. **JUDGMENT CREDITOR CANNOT REDEEM FROM HIS OWN SALE.** — A judgment creditor is not entitled, under the statute, to redeem from a sale made to satisfy a judgment entered in his own favor as well as in favor of other lien-holders. *Horn v. Indianapolis Nat. Bank*, 231.
2. **COMPLAINT DOES NOT SHOW CAUSE OF ACTION AGAINST SHERIFF WHO MADE SALE WHEN.** — A complaint which seeks to redeem from a sale affirms

the sale, and there can therefore be no cause of action against the sheriff who made the sale, even though he did not make a true return. *Id.*

See EXECUTORS AND ADMINISTRATORS, 11.

JURISDICTION.

1. **JURISDICTION NOT CONTROLLED BY ALLEGATIONS IN COMPLAINT.** — A declaration made in bad faith, alleging an excessive value for the purpose of maintaining a suit in the circuit court which should properly be brought in a justice's court because of the amount involved, is a fraud on the court, and will be dismissed on motion for want of jurisdiction. *Fix v. Sissung*, 616.
2. **IF THE PROOF OF SERVICE OF PROCESS IS NOT MADE AS REQUIRED BY LAW,** the court acquires no jurisdiction over the person of the defendant and has no authority to render judgment against him. *Reinhart v. Lugo*, 52.
3. **THE FINDING OR RECITAL OF DUE SERVICE OF PROCESS** is not conclusive when the proof of service is a part of the judgment roll, and, as it appears in such roll, is not sufficient evidence of such service, as where it is not sworn to nor does it appear to be certified by any officer as his act. *Id.*

See ACTIONS, 2; CONTRACTS, 7; MALICIOUS PROSECUTION; WILLS, 9.

JURY AND JURORS.

See CRIMINAL LAW, 4; EVIDENCE, 7; TRIAL, 9-11.

LAKES.

See WATERCOURSES.

LANDLORD AND TENANT.

1. **BREACH OF CONDITION IN LEASE — RE-ENTRY BY LANDLORD IN POSSESSION.** — Where by the terms of a lease the landlord is entitled to remain in possession subject to the rights of the tenant, the landlord need not make a formal re-entry, in order to take advantage of the breach of a forfeiture clause inserted in the lease for his benefit. His election to forfeit while he is in actual possession is a constructive entry under his title. *Ray v. Western Pennsylvania Natural Gas Co.*, 922.
2. **FORFEITURE OF LEASE FOR BREACH OF CONDITION.** — Where a condition in a lease is inserted solely in the interest of the landlord, the lease is void upon a breach of the condition, if the landlord by some positive act elects to take advantage of it, but the tenant cannot set up his own default as a cause of forfeiture. *Id.*
3. **FORFEITURE OF LEASE AS DEFENSE BY TENANT.** — Where a lease contains a forfeiture clause providing that the tenant shall complete an oil-well within a certain time or pay the landlord specified sums semi-annually until completion, and in default of performance of such condition the lease shall become null and void, the landlord has the option either to declare a forfeiture or to affirm the continuance of lease after a breach of the condition; and if he does not choose to avail himself of the forfeiture, it cannot be set up as a defense by the tenant to an action in affirmation of the lease. *Id.*

4. **LANDLORD AND TENANT — ENFORCEMENT OF LEASE BY MARRIED WOMAN.** — Where a married woman whose lease is not binding upon her, because not properly acknowledged, has complied with all the conditions thereof, her coverture cannot be set up as a defense in an action on the lease. *Id.*

LEASE.

See **LANDLORD AND TENANT; RAILROAD COMPANIES, 1.**

LEGISLATURE.

LEGISLATIVE CONTROL OF STATE FUNDS. — The control, disposition, and appropriation of state funds to the payment of debts against the state are powers exclusively belonging to the legislature, and cannot be delegated to or exercised by the courts, under the Louisiana constitution. *Curier v. State, 404.*

LIBEL AND SLANDER.

1. **GRAVAMEN OF LIBEL CONSISTS IN ITS PUBLICATION.** — Accordingly, the fact that a libelous card or advertisement was written by a person other than the publisher will not exonerate the latter from liability. *Riley v. Lee, 358.*
2. **ADVERTISEMENT CHARGING FALSEHOOD.** — A written or printed publication which tends to degrade or disgrace the person about whom it is written or printed, or which tends to render him odious, ridiculous, or contemptible in the estimation of his friends or acquaintances or the public, is, *per se*, actionable as libelous. Accordingly, the publication of a card in a newspaper, charging a person with having uttered a falsehood, is libelous *per se*. *Id.*
3. **DEFAMATORY ADVERTISEMENT.** — An advertisement proclaiming the defamation of a person's character, and averred to have been published without malice, as a matter of news, is not the subject of a lawful advertisement unless it is proved to be true, and in the absence of such proof, the publisher must answer in damages. *Id.*
4. **CHARGING PERSON WITH BEING A RETURNED CONVICT.** — A false publication in a newspaper, concerning a person, that he has been a convict in a state penitentiary, is libelous *per se*. *State v. Brady, 296.*
5. **CRITICISM IS DISCUSSION;** or as applicable in libel cases, a censure of the conduct, character, or utterances of the person criticised. *Belknap v. Ball, 622.*
6. **CRITICISM OF OFFICIAL CANDIDATE.** — When one becomes a candidate for public office, he thereby deliberately places his conduct, character, and utterances before the public for their discussion and consideration. They may be criticised according to the taste of the writer or speaker, and the law will protect them in so doing, provided their statements of or reference to the facts upon which their criticisms are based observe an honest regard for the truth. In such discussion the law gives a wide liberty. Within this limit public journals, public speakers, and private individuals may express opinions and indulge in criticisms upon the character or habits or mental and moral qualifications of official candidates. *Id.*
7. **FALSE STATEMENT OF UTTERANCES OF OFFICIAL CANDIDATE.** — A false and malicious published statement that a candidate for public office gave utterance, either in writing or in speech, to certain language, implying his ignorance and unfitness for office, is neither privileged criticism nor expression of opinion, but is libelous. Such statement is

statement of fact, for the falsity of which the publisher is answerable.
Id.

8. **FALSE STATEMENT OF UTTERANCES OF OFFICIAL CANDIDATE.** — A false and malicious publication in a newspaper, in a coarse and blotted imitation of the handwriting of a candidate for office, purporting to be a fac-simile of the words, "I don't propose to go into debate on the tariff differences on wool, quinine, and all the things, because I ain't built that way. — Charles E. Belknap," or such publication of a report of a speech made by him in which he is made to give utterance to language to the same effect, is libelous. *Id.*
9. **CHARACTER AND REPUTATION OF CANDIDATES** for public office are protected from malicious attack by the same rules as are those of private individuals. Greater latitude is allowed in the case of the former than in the latter; and beyond this the same rule applies to both. *Id.*
10. **PRIVILEGED COMMUNICATIONS.** — In actions for libel, qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty, and embraces cases where the duty is not a legal one, but is of a moral or social character of imperfect obligation. *Pollasky v. Minchener*, 516.
11. **PUBLICATION OF FALSEHOOD IS NEVER PRIVILEGED.** No public interest can be subserved by its publication and circulation. If false statements are published in good faith, with an honest belief of their truth, damages may be reduced to a minimum. No other rule will protect the freedom of the press and the rights of individuals. *Belknap v. Ball*, 622.
12. **FREEDOM OF PRESS.** — The constitutional guaranty of "the freedom of the press" is simply intended to secure to the conductors of the press the same rights and immunities, and such only, as are enjoyed by the public at large, in relation to criticising the acts of public officers and private individuals. *Riley v. Lee*, 358.
13. **MERCANTILE AGENCY — PRIVILEGED COMMUNICATION.** — A mercantile agency does not stand in such relation either of interest or duty with its subscribers that communications from it to them generally are privileged. Exceptions exist in relation to those persons who are interested in obtaining the particular information and to whom it is furnished upon special request. To this extent, and no further, are such communications protected by a qualified privilege. *Pollasky v. Minchener*, 516.
14. **LIBEL BY MERCANTILE AGENCY.** — False publications respecting the character and financial standing of a business man, furnished by a mercantile agency to its subscribers generally, without request, is libelous, and not privileged, though made in good faith. *Id.*
15. **LIBEL BY AGENT OF MERCANTILE AGENCY.** — A general agent and district business manager for a mercantile agency who furnishes, or causes to be furnished, through his chief clerk, to its subscribers generally, without request, false publications respecting the character and financial standing of a business man, is liable in an action for libel therefor, as such communications are not privileged. *Id.*
16. **MALICE IN LIBEL CONSISTS IN INTENTIONALLY PUBLISHING**, without justifiable cause, any written or printed matter which is injurious to the character of another; and everything written and published of another that is injurious to his character must, for the purposes of the action, be

- taken to be false, until it is shown by plea and proof to be true; and the presumption of malice remains through the entire case until it is met by plea and proof of a contrary motive, or that the publication was justifiable. *Riley v. Lee*, 358.
17. **EXPRESS MALICE IS PRESUMED, AND NEED NOT BE PROVED**, when the words published are libelous *per se*. *State v. Brady*, 296.
 18. **REPUBLICATION AS EVIDENCE OF MALICE**. — The republication of a newspaper article, after the commencement of an action charging it to be libelous, with comments thereon by the defendant, may be evidence of malice. *Welch v. Tribune Pub. Co.*, 629.
 19. **EVIDENCE — MALICE**. — In an action of libel against a newspaper publisher for charging that a jury perjured themselves in returning a verdict, evidence on the part of the plaintiff as to whether or not any influence other than that of the evidence and the instructions and arguments of counsel was brought to bear upon him as a juror in the consideration and conclusion of his verdict is immaterial, and inadmissible to show malice. *Id.*
 20. **EVIDENCE OF MALICE**. — In an action of libel against the publisher of a newspaper for charging that a jury perjured themselves in rendering a verdict, evidence that a written request, signed by all the jurors, requesting such publisher to make a retraction, is admissible to show malice, upon proof that such request reached such publisher. *Id.*
 21. **EVIDENCE OF JUSTIFICATION**. — In an action of libel against the publisher of a newspaper for charging that a jury perjured themselves in rendering a verdict, evidence that other newspapers published in the place where the verdict was rendered severely criticised the action of the jury as extraordinary is admissible in justification. *Id.*
 22. **EVIDENCE OF MOTIVE FOR VERDICT**. — In an action of libel by a juror against a publisher of a newspaper for charging that a jury perjured themselves in rendering a verdict, the plaintiff, as a witness in his own behalf, cannot be compelled, on cross-examination, to state his motives or reasons for finding the verdict. *Id.*
 23. **LIBEL OF JURY**. — A newspaper publication charging that a jury have perjured themselves in rendering a verdict is libelous. *Id.*
 24. **WORDS NOT DEFAMATORY WILL SUPPORT AN ACTION FOR SLANDER**, if they are falsely and deliberately uttered to work injury, and accomplish their intended purpose. *Morasse v. Brochu*, 474.
 25. **WORDS ARE ACTIONABLE PER SE** which convey an imputation upon one in the way of his profession or occupation, and in such case there need be no averment of special damages. *Id.*
 26. **A PRIEST IS LIABLE TO AN ACTION FOR SLANDER**, if, referring to a physician who has contracted a second marriage before the death of his divorced wife, he informs his congregation, in effect, that the fact of such marriage is to excommunicate the person referred to, and that if any of them should be sick, and in want of the priest's assistance, they need not send for him if such physician was there, because he, the priest, would not be in the same room with him. These words were a virtual instruction that the person referred to was an unsuitable and improper person to be employed as a physician, and a direction not to employ him, on pain of losing caste in the church and the ministrations of its priest. *Id.*
 27. **WORDS ACTIONABLE PER SE**. — The words, "What are you doing with that nine-dollar black-mailer here?" spoken of an employee to her em-

ployer by a stockholder and director in the company for whom she works, are not a privileged communication, but are slanderous, and actionable *per se*. *Hess v. Sparks*, 300.

28. MEASURE OF DAMAGES. — Where the words spoken are slanderous *per se*, and are uttered maliciously, punitive as well as compensatory damages may be recovered. *Id.*
29. PRIVILEGE OF COMMUNICATION MUST BE PLEADED. — In slander, the issue that the words spoken were a privileged communication is not raised by a general denial. Such privilege must be specially pleaded. *Id.*
30. PLEADING. — THE NAMES OF PERSONS WHO HAVE CEASED TO EMPLOY PLAINTIFF need not, it has been held, be stated in a complaint in an action to recover special damages for slander, whereby plaintiff was injured in his trade or profession. The rule upon this subject in Massachusetts discussed, but not decided. *Morusse v. Brochu*, 474.
31. EVIDENCE IN AGGRAVATION OF DAMAGES. — Where a physician has sued a priest for slander, it is proper to prove, in aggravation of damages, that after the action was brought the defendant referred to it in the presence of his congregation, and said, "We shall see if the church shall destroy the vermin or the vermin the church." *Id.*

See CRIMINAL LAW, 12, 13.

LIFE ESTATES.

See WILLS, 12-14.

LIMITATIONS OF ACTIONS.

1. ABSENCE FROM STATE. — If a defendant is absent from the state when a cause of action accrues against him, his occasional or frequent visits to the state, giving the plaintiff an opportunity, by the exercise of ordinary diligence, to commence an action against him, will be of no avail to him under a plea of the statute of limitations, however open and notorious his visits may have been, unless he has been within the state and the jurisdiction of her courts for the full period limited by the statute, either continuously or in the aggregate. *Stanley v. Stanley*, 806.
2. ABSENCE FROM STATE. — The statute of limitations does not run in favor of a defendant while he is absent from the state, no matter if he was so absent when the cause of action accrued; and whenever he departs from the state after having come into it, the running of the statute is suspended from that time and during his absence, whether the cause of action first accrued while he was in, or while he was absent from, the state. *Id.*
3. AMENDMENTS BRINGING IN NEW PARTIES. — Where a plaintiff commences his action against a corporation, and it is served with summons as such, when no such corporation exists, and, after the statute of limitations has fully run, he amends his petition so as to bring in new parties as partners and defendants, the new parties so brought in may successfully rely upon the statute of limitations as a defense. *Leatherman v. Times Co.*, 342.

See CORPORATIONS, 15-18; DEEDS, 5; EXECUTIONS, 3-5; TRUST AND TRUSTEES, 2.

LOST INSTRUMENTS.

See WILLS, 19, 20.

LOTTERY.

See CRIMINAL LAW, 14, 15.

MALICE.

See CRIMINAL LAW, 5, 23; DAMAGES, 2; LIBEL AND SLANDER, 10-21.

MALICIOUS PROSECUTION.

1. JURISDICTION. — Where wrong and injury is done by a malicious suit, it is immaterial, upon principle, whether or not the court had jurisdiction to entertain such suit, in order that a recovery may be had for the malicious prosecution. *Antcliff v. June*, 533.
2. IT IS NOT NECESSARY, IN ORDER TO MAINTAIN action for the malicious prosecution of a civil suit, that the person should be molested or his property seized, if it appears that the suit was malicious, without probable cause, and that the party has been injured or damaged thereby. *Id.*
3. ACTION FOR ABUSE OF PROCESS. — Where process is willfully made use of for a purpose not justified by law, this is an abuse for which an action will lie. *Id.*
4. PROCESS, ABUSE OF. — OBTAINING A JUDGMENT BY FRAUD AND PERJURY, not based upon any valid demand, and suing out execution upon such judgment knowing it to be false and fraudulent, and extorting money under such execution, is an abuse of process for which an action will lie. *Id.*

MARRIAGE AND DIVORCE.

1. DIVORCE — ADMISSIONS AS EVIDENCE. — In an action for divorce, admissions of a party against himself are admissible in evidence, if obtained without connivance, fraud, coercion, or other improper means. *Burke v. Burke*, 283.
2. *ID.* — ADULTERY OF BOTH PARTIES. — Divorce is a remedy provided for the innocent party, and one shown to be guilty of adultery cannot have a divorce for adultery committed by the other, when there has been no condonation. *Id.*
3. *ID.* — ADULTERY, PROOF OF. — In an action for divorce on the ground of adultery, the proof must be clear, positive, and satisfactory, and although presumptive evidence alone is sufficient to establish adulterous intercourse, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion. Appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. *Id.*
4. *ID.* — ADULTERY, PROOF OF. — In an action for divorce on the ground of adultery, proof of frequent opportunity for illicit intercourse, without proof of a will to improve it, will not justify an inference of guilt; it must be further shown that the parties were together under suspicious circumstances not to be easily accounted for unless they had the corrupt design. *Id.*
5. EXTREME CRUELTY. — Where a husband conveys to his wife his homestead and household furniture, constituting the bulk of his property, after which his wife refuses to cohabit with him, and although allowing him to keep a room in the house, finally drives him from it by

moving away and leasing the house to strangers, this constitutes extreme cruelty on her part, which entitles the husband to a divorce. *Messer v. Messer*, 606.

6. **DIVORCE BECAUSE OF THE IMPRISONMENT OF DEFENDANT** in a state prison, or in a jail or house of correction, will not be granted when such imprisonment is in another state. The statute making imprisonment a cause for divorce means imprisonment in this state for some offense known to the laws thereof. *Leonard v. Leonard*, 437.
7. **GROWING CROP, WHEN WILL PASS AS PART OF ALIMONY.** — A crop of wheat, sown on land by the husband as owner, after the commencement by his wife of a suit for divorce and alimony against him, passes to the wife as a purchaser, by a decree which gives her the land in dispute, and does not, in terms, describe or refer to the wheat. *Herron v. Herron*, 854.
8. **DECREE OF DIVORCE VOID, WHERE NEITHER PARTY RESIDES IN JURISDICTION.** — Where neither the plaintiff nor the defendant is a resident of the state or territory in which a decree of divorce is pronounced, its courts have no jurisdiction, and their decree is void. To give validity to the decree of a court in a suit for divorce, one, at least, of the parties, must be a resident of the state or territory in which the decree is rendered. The courts of one state cannot, by judgment or decree, fix the status of the citizens of another state. A reply to an answer alleging that the defendant had procured a divorce from the plaintiff in Montana, having been a resident of that territory for more than the period required to give its courts jurisdiction, which alleges that neither of the parties was a resident of Montana at any time, is therefore good. *Watkins v. Watkins*, 217.

See WILLS, 7, 8.

MARRIED WOMEN.

See HUSBAND AND WIFE; LANDLORD AND TENANT, 4.

MASTER AND SERVANT.

1. **RAILROAD'S LIABILITY FOR NEGLIGENCE OF SERVANT.** — A railroad company is liable for the negligence of its servant in placing and leaving torpedoes, of which he has the custody, on its track at a point where the public, including children, are permitted to pass, notwithstanding such negligent acts of the servant are wanton, reckless, needless, and against the rules of the company. *Pittsburgh etc. R'y Co. v. Shields*, 840.
2. **CUSTODY OF DANGEROUS INSTRUMENT — LIABILITY FOR NEGLIGENCE OF SERVANT.** — A person having in his custody instruments of danger must keep them with the utmost care, and one charged with such duty cannot devolve it upon his servant, so as to exonerate himself from the consequences of injury caused to others by the negligent manner in which the duty in regard to the custody of such instruments may be performed by such servant. *Id.*

LIABILITY FOR NEGLIGENCE OF SERVANT. — Whatever the servant is intrusted by the master to do for him must be done with the same care and prudence that would be required of the master acting in that regard for himself. If it is the custody of dangerous instruments, the servant must observe the utmost care. *Id.*

4. **LIABILITY FOR NEGLIGENCE OF SERVANT OUTSIDE EMPLOYMENT.** — A servant may depart from his employment without making the master liable for his negligence, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. *Id.*
5. **LIABILITY FOR NEGLIGENCE OF SERVANT.** — A servant cannot depart from a duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences of the negligence of the servant; nor is it necessary, to make the master liable, that there should be specific directions as to the particular act. It is sufficient if the general relation of master and servant within the range of such act exists, and that the wrong inflicted was incidental to the discharge of the duty with which the servant was intrusted. *Id.*
6. **LIABILITY FOR NEGLIGENCE OF SERVANT.** — Where the master has a duty to perform, and intrusts it to his servant, who disregards it to the injury of another, it is immaterial, so far as the liability of the master is concerned, with what motive or for what purpose the servant neglects such duty. *Id.*
7. **EMPLOYEE OF ONE EMPLOYER CANNOT, WITHOUT HIS ASSENT, BE MADE TO ASSUME HAZARDS OF SERVICE CONDUCTED BY ANOTHER.** — A person entering into a contract of service with one employer may not, without his knowledge or assent, be made to assume the hazards of a service conducted by another, and in which he is not engaged, and thus be personally subjected to the consequences of the negligence of the latter, without remedy against him. *Brewer v. New York etc. R. R. Co.*, 647.
8. **LIABILITY OF RAILROAD COMPANY FOR DEATH OF EXPRESS MESSENGER RESULTING FROM ITS NEGLIGENCE.** — A railway company is liable for its negligence resulting in the death of an express messenger carried on its road free, under a contract between it and the express company, in which it is stipulated that in no event, whether of negligence or otherwise, shall the railway company be responsible for property carried by it free of charge, where there is no evidence that such messenger had any knowledge of the provisions of the contract. When he entered the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that he took upon himself the risks of injury he might suffer from the negligence or fault of the railway company. *Id.*
9. **EMPLOYEE'S AGREEMENT THAT HE WILL NOT HOLD HIS EMPLOYER LIABLE** for damages resulting from the negligence of the latter, or his servants or agents, is without consideration, and void, when the former was already in the latter's employment, and there was no new employment tendered to or accepted by him, and no promise to continue to employ him after the execution of the agreement. *Purdy v. Rome etc. R. R. Co.*, 736.
10. **RISK ASSUMED.** — Where a servant has full knowledge of, and is abundantly cautioned against certain sources of, danger, and voluntarily neglects such warnings, and takes the risk of such perils and dangers, and is then injured through the negligence of the master, from an entirely different source of danger, of which he knew and could know

nothing, and of whose existence it was the duty of the master to warn him, his failure to heed the warning given does not constitute contributory negligence as to the injury received. *Smithwick v. Hall et al. Co.*, 104.

11. **AN EMPLOYER IS UNDER NO OBLIGATION TO WARN** an employee of danger which is obvious, nor to instruct him in matters which he may fairly be supposed to thoroughly understand. Nor is it the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it. It is the duty of the servant to use care proportionate to the dangers of his situation as he understands it; and if he fails to do so, the fault is his, and not his master's. *Ciriack v. Merchants' W. Co.*, 438.
12. **IF THE WORK OF A SERVANT EXPOSES HIM TO DANGER** of which he is ignorant, and which, from his youth and inexperience, he is incapable of comprehending without assistance, it is the duty of the master, if he knows or ought to know of it, to give him such warning and instruction as is necessary for his safety. To determine a master's duty, the inquiry must be, What instruction does the servant appear to need? *Id.*
13. **IF A BOY TWELVE YEARS OF AGE** is employed, and is of less than the average intelligence of boys of his age, and the defendant knew or ought to have known this, and he is put to work in a place dimly lighted, in the same room with machinery with rapidly revolving gearing, and is told to go between the machines and to get a tool, and to hurry, and some part of his clothing is caught in the gearing, and he is drawn in and injured, there is sufficient evidence of negligence to warrant the submission of the case to the jury, if the injured boy had not been working upon or near the dangerous machinery, and was sent for the tool, without being given any warning or instruction concerning the danger attendant upon his getting into a position which it was necessary for him to assume in getting the tool. *Id.*
14. **CONTRIBUTORY NEGLIGENCE — DANGEROUS POSITION.** — A servant by changing his position at work, contrary to orders and after a warning of danger, voluntarily takes the risks of all perils which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the master's negligence from other sources, dangers which the servant was not bound to anticipate, and of whose existence he had no knowledge, he takes no risk and assumes no duty of taking care; and if injury results to him from such dangers, he is not guilty of contributory negligence. *Smithwick v. Hall and Upson Co.*, 104.
15. **FAILURE TO GUARD TRAP-DOOR.** — Where injury results from a failure of employees to properly guard an open trap-door while in use, their violation of instructions to guard it cannot be shown in defense. *Engel v. Smith* 549.

MAXIMS.

Party seeking equity must do equity: *Datz v. Phillips*, 864.

MERCANTILE AGENCY.

See LIBEL AND SLANDER, 13-15.

MERGER.

See JUDGMENTS, 1-3.

MORTGAGES.

1. **ABSOLUTE CONVEYANCE AS MORTGAGE — DEGREE OF PROOF TO ESTABLISH.** — The fact that an absolute conveyance was intended as a mortgage must be established by a clear preponderance of the evidence; or in other words, the proof of that fact must be clear of reasonable doubt. *Winton v. Burnell*, 289.
 2. **PRIORITY AS BETWEEN MORTGAGE NOTES.** — Where several distinct notes are secured by one mortgage, no one of them has any preference over the rest in consequence of falling due at an earlier date. *Jennings v. Moore*, 601.
 3. **MORTGAGE ASSIGNEE'S FORECLOSURE OF PART INTEREST — PRIORITY OF LIEN — REDEMPTION.** — An assignee under an assignment of a part interest in a mortgage and the notes secured thereby, containing no provision for any priority of lien, who has foreclosed, and upon the expiration of the time in which to redeem has purchased the equity of redemption, and has gone into possession under his sheriff's deed, does not thereby gain any priority of right over the assignor; but as the purchaser of the equity of redemption, he has a right to redeem from the lien of the assignor, and failing to do this, the premises will be sold and the proceeds divided according to the respective interests of the assignor and assignee. *Id.*
 4. **REMEDY OF JUNIOR MORTGAGEE WHERE SHERIFF SELLS REALTY AS PERSONALTY.** — If a sheriff at a foreclosure sale sells as personal property that which is in fact real property, the remedy of a junior mortgagee is to attack the sale itself as invalid, and not by a suit to redeem. *Horn v. Indianapolis Nat. Bank*, 231.
 5. **DECREE OF FORECLOSURE WHICH DOES NOT ADJUDGATE UPON CHARACTER OF PROPERTY** which is ordered sold to satisfy the mortgage does not estop the senior lien-holder to treat the property as personalty. *Id.*
 6. **EQUITABLE TENDER, WHEN NOT REQUIRED IN SUIT TO REDEEM.** — While the general rule is that the plaintiff in a suit to redeem real property must make an equitable tender of the amount due the senior lien-holder, if it appears that the lien-holder has money in his hands exceeding the amount of his lien, which he is equitably bound to apply to the discharge of his claim, such tender is not required. *Id.*
 7. **MORTGAGEE IN POSSESSION CANNOT EMBARRASS RIGHT TO REDEEM BY MAKING IMPROVEMENTS.** — He may make repairs, but he cannot make improvements, at the expense of redemptioners. *Id.*
 8. **MORTGAGE BONDS, RIGHT OF HOLDER OF, AS AGAINST COUPON-HOLDER.** — Where interest coupons of mortgage bonds have been presented and paid for with money supplied by a third person, under a private agreement between him and the mortgagor that such coupons should be treated as unpaid, and the third party treated as an original holder, with the right to share in the proceeds of the sale of the mortgaged property equally with the bond-holders, such agreement is void as to the latter. *Fidelity Ins. etc. Co. v. Western Pennsylvania R. R. Co.*, 911.
- See CHATTEL MORTGAGES; CORPORATIONS, 9, 10; EQUITY; EVIDENCE, 9; FIXTURES.

MUNICIPAL CORPORATIONS.

1. **RIGHT TO CONTROL USE OF RIVER BANK.** — A city has the right to control, manage, and administer the use of the river banks within the corporate limits for the public convenience and utility; to establish

- wharves and landings; to erect and provide facilities for the use of vessels and water-craft; and to charge just compensation for the use thereof. Riparian owners or their lessees have no right to appropriate these banks to their exclusive use for such or any other purposes, and they have no private property in the use thereof which is in the public. *Sweeney v. Shakespeare*, 400.
2. *Id.* — The discretion exercised by a municipal corporation in determining what are proper and needful facilities for commerce, and on what part of the river bank, within its limits, they should be established, is not a proper subject for judicial control or interference. Whatever incidental damage may result to riparian proprietors or their lessees from the exercise of such discretion is *damnum absque injuria*. *Id.*
 3. *Id.* — A riparian owner along the banks of a river within the corporate limits of a city, or his lessee, has no right to erect on the batture outside the levee in front of his property, upon piles driven in the earth, sheds or other structures for his own exclusive use and benefit; and in case of such erection the city may order the same removed, and upon refusal by the owner, may remove them. *Id.*
 4. **POWER TO ISSUE OBLIGATION TO PAY MONEY.** — A municipal corporation has no right as an incidental function to borrow money, issue negotiable securities or unconditional obligations to pay money, without express legislative sanction or irresistible implication. It may, however, issue warrants or orders negotiable in form and transferable by delivery or indorsement, but they are not negotiable paper in the hands of the holder so as to exclude inquiry into the legality of their issue, or to preclude defenses thereto. *Newgass v. New Orleans*, 368.
 5. **CERTIFICATES OF INDEBTEDNESS** issued by a municipal corporation without express authority of law, and regularly filled in the name of its creditor or bearer, are not unconditional obligations to pay, and are not negotiable so as to pass title by delivery, especially when the ordinance under which they are issued is printed on and forms part thereof, and requires as a condition precedent to their issue that the party named therein sign a receipt therefor, which condition has not been complied with. In such case the question as to whether or not they were fraudulently issued, or the good faith of the holder for value, is immaterial. The holder takes them with notice of everything which appears thereon. *Id.*
 6. **ORDINANCE REGULATING REMOVAL OF GARBAGE.** — Under a statute authorizing a city council to provide by ordinance for the manner of removal of garbage from a city, and to impose and enforce appropriate penalties, an ordinance requiring the garbage to be removed through and out of the city in closed, water-tight carts or wagons, marked "Garbage," is reasonable and valid. *People v. Gordon*, 524.
 7. **CONSTITUTIONALITY OF ORDINANCE PROHIBITING SMOKING IN STREET-CARS.** — An ordinance making it an offense for passengers to smoke while in street-cars, adopted by a city under its charter conferring authority to maintain good health and sanitary conditions and to suppress nuisances, is constitutional and valid. *State v. Heidenhain*, 388.
 8. **POWER TO ABATE SMOKING IN STREET-CARS.** — A city, in the exercise of its legislative discretion, may determine what is a nuisance, and enact necessary ordinances to suppress it, and it may thus abate, as a nuisance, the act of smoking by passengers while in street-cars, as part of the police power vested in it. *Id.*

8. **POWER TO DETERMINE WHAT IS NUISANCE.** — The discretion exercised by a municipal corporation in determining what is a nuisance will not be judicially interfered with, unless the corporation has been manifestly unreasonable and oppressive, or has invaded private rights and transgressed the power granted it. An ordinance prohibiting smoking by passengers in street-cars is not open to attack on either of these grounds. *Id.*
10. **VIOLATIONS OF MUNICIPAL ORDINANCES** are not usually or properly regarded as crimes, in the sense in which that word is commonly used, which embraces only offenses against the public criminal statutes of the state. The laws regulating forms of proceeding, and the constitutional provisions relating to the latter, do not apply to the former. *State v. Bonell*, 413.
11. **ENFORCEMENT OF ORDINANCE.** — Where a city has authority to enforce her legal ordinance by the imposition of fine, and by imprisonment in default of payment, the city recorder must enforce such ordinance, and cannot himself violate the same by imposing a greater or less penalty. *Id.*
12. **RIGHT TO SET OFF JUDGMENT DEBT AGAINST CONTRACTOR.** — Where a person who is doing work for a city under contract is also a judgment debtor of such city, the latter can require him to complete the work according to the contract, and in an action for the price can set off its judgment against him, notwithstanding the fact that he borrowed money to pay for labor and materials to complete the contract. *Clement v. City of Philadelphia*, 876.
13. **RIGHT TO SET OFF JUDGMENT DEBT AGAINST CONTRACTOR OR HIS ASSIGNEE.** — Where a contractor doing work for a city is also its judgment debtor, and consents that it shall set off part of the contract price in payment of its judgment, an agreement, of which the city is ignorant, between the contractor and his surety, that the latter is to receive, as security for advances made by him, all warrants for money to become due on the contract does not give the surety an equitable or legal claim superior to the city's right of set-off. Hence the surety cannot recover of the city the money so appropriated in satisfaction of its judgment. *Id.*
14. **RIGHT TO SET OFF JUDGMENT DEBT AGAINST CONTRACTOR OR HIS SURETY AND ASSIGNEE.** — Where a city contractor is also the judgment debtor of the city, notice to the latter of a power of attorney, empowering the surety of the contractor to receive all warrants coming to the latter, is not notice of the surety's interest for advances made on the contract, and imposes no duty on the city to notify him of its judgment against the contractor, or to relinquish its right of set-off against the money due on the contract. *Id.*
15. **MUNICIPAL CORPORATIONS ARE NOT LIABLE TO PRIVATE ACTIONS FOR OMISSION OR NEGLECT** in the performance of a corporate duty imposed upon them by law, or for that of their servants employed therein, when such corporations derive no benefit therefrom in their corporate capacity, unless such action is given by statute. *Curran v. Boston*, 465.
16. **MUNICIPAL CORPORATION MAINTAINING A WORKHOUSE,** when authorized though not required to do so by an act of the legislature, does not become answerable for the negligence of its officers or servants on the ground that it has voluntarily assumed the duty of maintaining such workhouse. It is performing a strictly public duty, which cannot be of any advantage to it. *Id.*

17. **MUNICIPAL CORPORATION CANNOT BE HELD ANSWERABLE** for the negligence of its officers and servants in charge of an inmate of a workhouse, when its government is by law placed in the hands of a board of directors of public institutions, which, though elected by the city council, is an independent body, and not in any sense the agent or servant of the city. *Id.*
18. **MUNICIPAL CORPORATION CANNOT BE HELD ANSWERABLE FOR THE NEGLIGENCE** or omissions of its officers or servants in charge of a workhouse on the ground that its inmates are required to be kept at work, and some revenue is derived from their labor, if the institution is not conducted with a view to pecuniary profit. *Id.*
- See CORPORATIONS, 4; DEDICATION, 1, 2; INJUNCTIONS, 3; TELEGRAPH COMPANIES, 7-10.

MUTUAL BENEFIT SOCIETIES.

See INSURANCE, 22-27.

NEGLIGENCE.

1. **NEGLIGENCE PRESUPPOSES A DUTY OF TAKING CARE**, and this, in turn, presupposes knowledge or its legal equivalent. *Smithwick v. Hall etc. Co.*, 104.
2. **FAILURE TO GUARD TRAP-DOOR.** — The mere existence and use of trap-doors, elevator-shafts, and similar openings in floors of ware-houses, manufactories, or other business buildings, is not evidence of negligence; still, they are dangerous openings, especially if located in places obscured by darkness, or in such close proximity to doors that a person entering may step into them unawares. The fact of their dangerous character makes it the duty of those maintaining them to properly guard them when they are open. If it is not practical to guard them with a railing, the owner is bound to give actual notice of the danger to any one lawfully approaching them, and in default of such notice is liable for all injuries resulting therefrom. *Nagel v. Smith*, 549.
3. **CONTRIBUTORY NEGLIGENCE, WHAT CONSTITUTES.** — An act or omission of a party injured, to amount to contributory negligence, must be negligent, and in the production of the injury, it must operate as a proximate cause or one of the proximate causes, and not merely as a condition. *Smithwick v. Hall etc. Co.*, 104.
4. **CONTRIBUTORY NEGLIGENCE, WHAT CONSTITUTES.** — An act or omission must contribute to the happening of the act or event causing the injury, to constitute contributory negligence; and if the act or omission merely increases or adds to the extent of the loss or injury, it will not have that effect, though it may affect the amount of damages to be recovered. *Id.*
5. **CONTRIBUTORY NEGLIGENCE — FAILURE TO LOOK OUT FOR OPEN TRAP-DOOR.** — It is not contributory negligence in an employee to fail to look out for danger arising from an open trap-door, when there is no reason on his part to apprehend any such danger. Every one has a right to presume that another, owing a special duty to guard against danger, will perform that duty. *Angel v. Smith*, 549.
6. **WHEN QUESTION OF CONTRIBUTORY NEGLIGENCE IS NOT FREE FROM DOUBT**, the facts should be submitted to the jury. *Id.*
7. **EVIDENCE SUFFICIENT TO REQUIRE QUESTION OF DEFENDANT'S NEGLIGENCE TO BE SUBMITTED TO JURY.** — Evidence that the plaintiff purchased and

was assigned to the lower berth of an ordinary sleeping-car run by the defendant; that on going to bed at night he placed his pocket-book, containing money, in the inside pocket of his vest, which he put under his pillow; that on waking in the morning he found the money had been stolen from the pocket-book; that the upper berth, which had been occupied by a stranger when he went to bed, was unoccupied when he woke in the morning; that the only person employed on the sleeper, which ran over an important thoroughfare, and made stops at several large cities during the night, was a man who acted as conductor and porter, and blacked the passengers' shoes for his own profit; that this man's closet was at one end of the car, from which a full view of the main aisle could not be had, — in, in the absence of explanation or evidence by the defendant, sufficient to require the question whether the plaintiff's loss was caused by the defendant's negligence to be submitted to the jury. *Carpenter v. New York etc. R. R. Co.*, 644.

8. GREATER CARE REQUIRED IN DEALING WITH CHILDREN OF TENDER YEARS THAN WITH PERSONS OF AGE OF DISCRETION. — Persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion; and greater care is required to avoid injury to such children, even when they are trespassers. *Penso v. McCormick*, 211.
9. LIABILITY FOR INJURY TO INFANT FROM FALLING INTO CONCEALED PIT-FALL. — Where the owners of a saw-mill, situated in a public part of a town, near a public highway, have, by their knowledge and acquiescence, given license to children of tender years to use their uninclosed lot as a play-ground, and without any warning to them, or others, construct a pit-fall in the ground where such children were accustomed to play, which they fill with burning embers, and which gave forth no signs of its condition or the danger in stepping upon its covering, and while in this condition a child of tender years enters upon it, as he was accustomed to do, without any knowledge of its changed condition, and is severely burned and injured, such owners will be liable for the injury. *Id.*
10. INFANT, WHEN SUI JURIS SO AS TO BE CHARGEABLE WITH NEGLIGENCE. — In the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*, and chargeable with the same degree of caution that an adult would be. *Tucker v. New York etc. R. R. Co.*, 670.

See ANIMALS; BANKS AND BANKING, 4; CARRIERS, 2, 5-10; DAMAGES, 1, 3, 4; EVIDENCE, 1, 2; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 15-18; RAILROAD COMPANIES; TELEGRAPH COMPANIES, 2.

NEGOTIABLE INSTRUMENTS.

1. ACCEPTANCE OF BILL OF EXCHANGE — COPY OF, DOES NOT CONTROL AVERTMENTS OF COMPLAINT. — In an action upon a bill of exchange drawn by the defendant, payable to his own order, and by him indorsed to the plaintiff, the acceptance is not the foundation of the action, and a copy thereof filed with the complaint cannot control its averments. *Brown v. Jones*, 227.
2. BILL OF EXCHANGE PRESENTED AND PROTESTED IN TIME WHEN. — A thirty-day bill of exchange, made and accepted on the 11th of February, 1884, was properly presented for payment and protested for non-pay-

ment on the 15th of March, 1884, where the law governing the case allowed three days of grace after its maturity. *Id.*

3. **PRESENTMENT OF BILL OF EXCHANGE, WHAT CONSTITUTES.** — If a bill of exchange is taken to the place designated in the acceptance as the place of payment, and the place is unoccupied and closed, and no one can be found to whom presentment for payment can be made, this amounts, in legal effect, to a presentment of the bill and a refusal to pay it. And there is no variance between a statement of these facts in the complaint, and a statement in the notice of dishonor that the bill was duly presented for payment. *Id.*
4. **NOTICE OF DISHONOR OF BILL OF EXCHANGE MAILED IN TIME WHEN.** — A notice of the protest of a bill of exchange mailed by the notary the next day after the protest is made is mailed in time. *Id.*
5. **NOTICE OF PROTEST OF BILL OF EXCHANGE, WHAT SUFFICIENT.** — A notice of protest of a bill of exchange in which figures are used to designate the months is not insufficient on that account. Such notice sufficiently describes the bill in these words: "A draft for \$500 on F. W. Pullen & Co., dated 2-11-84, payable thirty days after date, indorsed by —," and the words, "Done at the request of the First National Bank of Chicago," contained in such notice, are sufficient to show who held the paper and where it could be found. *Id.*
6. **INDORSEMENT OF DRAFT FOR THE PURPOSE OF COLLECTION ON ACCOUNT OF ITS OWNER** passes the legal title so far only as to enable the indorsee to demand, receive, and sue for the money to be paid. The owner may still control the paper, unless paid, and may intercept the proceeds of it in the hands of the intermediate agent. *Freeman's Nat. Bank v. Nat. Tube Works Co.*, 461.
7. **INDORSEMENT OF A DRAFT BY BANK A TO BE PAID TO BANK B FOR ACCOUNT OF BANK A**, and its indorsement by bank B that it is to be paid to bank F for account of bank B, do not imply that the draft is the property of bank B, but merely that it is to be paid to bank B as agent of bank A. An unbroken succession of such indorsements would indicate that each indorser was acting by direction of the next preceding indorser, who was himself the agent of the original owner, for whom the collection was to be made; and when it is made to the last indorsee, he has no right to apply it as having been the property of the last indorser, and if it remains uncollected to advance him moneys on account of it, and to enforce its collection as against the equitable owner to reimburse himself for such advances. *Id.*
8. **PROMISSORY NOTE MUST CONTAIN ON ITS FACE AN EXPRESS PROMISE TO pay money.** A mere promise implied by law, founded on an acknowledgment of indebtedness, is not sufficient. *Gay v. Rooke*, 434.
9. **PROMISSORY NOTE, WHAT IS NOT.** — "I O U, E. A. Gay, the sum of seventeen dolla. ⁵/₁₀₀, for value received," though signed by the writer, is not a promissory note, but a mere acknowledgment of indebtedness. *Id.*
10. **PROMISE TO PAY PRE-EXISTING DEBT OF ANOTHER, WITHOUT NEW CONSIDERATION, VOID.** — A note given by a widow for the payment of a debt due by her husband, who was insolvent at the time of his death, without any new consideration to support it, is void, and the renewal of the note from time to time will not raise such consideration. *Paxon v. Nields*, 888.
11. **PROMISSORY NOTE — ASSIGNMENT.** — A note signed by two obligors, and made payable to "order of myself," may be shown by extrinsic evidence

- to be payable to one of such obligors and to bind the other obligor thereon to the payee, and a third party who holds the note by indorsement from the payee may hold both obligors bound thereon. *Jenkins v. Bass*, 844.
12. *ID.* — One who makes a note payable to himself may become bound thereon to another by writing his name on the back of the note and delivering it to such other party. This under section 13, chapter 22, General Statutes of Kentucky. *Id.*
13. *EQUITABLE ASSIGNMENT OF GUARANTY ON NOTE.* — Where a note is payable on demand, and contains upon its face a written guaranty of payment by a third person and an assignment by the payee for value, such assignment will pass to the assignee the equitable interest of the assignor in the guaranty, in accordance with the manifest intention of the parties, it appearing that though nothing was said about the guaranty at the time of the assignment, it was practically all that gave the note any value, and that the paper was treated by all parties as one instrument for the security and payment of the note. *Lemon v. Strong*, 123.
14. *BREACH OF WARRANTY, WHEN NO DEFENSE TO A NOTE.* — It is not a good defense against a *bona fide* holder for value that he was informed that the note was made in consideration of an executory contract of warranty, unless he was also informed of its breach. *Miller v. Ottaway*, 513.
15. *COLLATERAL WARRANTY NO DEFENSE AGAINST PURCHASER OF NOTE BEFORE MATURITY.* — A mere collateral agreement or warranty made at the time a note is given does not affect its negotiability, although the purchaser before maturity may know of such agreement. *Id.*
16. *BREACH OF WARRANTY IN SALE NO DEFENSE ON NOTE.* — A purchaser of mares, sold at auction under warranty that they are with foal, who gives his note in payment, which is purchased by a third person for value, in good faith and before maturity, with knowledge of the warranty, but without knowledge of its breach, cannot set up the defense of a breach of the warranty in a suit on his note. *Id.*
- See *BANKS AND BANKING*; *CORPORATIONS*, 12, 13; *EVIDENCE*, 12-14; *JUDGMENTS*, 2; *MUNICIPAL CORPORATIONS*, 4, 5.

NEW TRIAL.

See *APPEAL AND ERROR*, 4.

NOMINAL DAMAGES.

See *DAMAGES*, 5.

NON-RESIDENTS.

See *CORPORATIONS*, 26, 27; *JUDGMENTS*, 4-6; *PROCESS*, 2-6.

NONSUIT.

See *TRIAL*, 3, 4.

NOTES.

See *NEGOTIABLE INSTRUMENTS*, 8-16.

NOTICE.

See CHATTEL MORTGAGES, 5; CORPORATIONS, 23.

NOTARIES PUBLIC.

1. **LIABILITY OF SURETY ON OFFICIAL BOND.** — The law which specifies the conditions and obligations of an official bond furnished by a notary public in compliance therewith forms part of the bond, and must be strictly construed against the surety therein. *Schmitt v. Drouet*, 408.
2. **ID.** — The surety on the official bond of a notary public is liable only to such persons as have employed him, and who have suffered injury on account of his failure to perform a duty incumbent on him or required and authorized by law. *Id.*
3. **ID.** — Where a notary public does a thing which the law does not authorize him to do, although he does so *eo nomine*, in his capacity of a notary, the surety on his bond is not liable. *Id.*
4. **ID.** — A notary public is not authorized by law, nor is it a duty incumbent upon him, to write officially on any note, or utter any certificate, that a prolongation of payment of a debt has been allowed by an act before him; hence the surety on his official bond is not liable for such act, even if such certificate is shown to be false. *Id.*

NUISANCES.

1. **HIGH FENCE ERECTED FOR SPITE**, and with malice, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance. *Flaherty v. Moran*, 510.
2. **CONTINUING LIABILITY FOR.** — The building and maintaining of a railway in such a manner as to bring together natural streams of water so as to discharge them through a culvert, at a place different from that of the natural discharge of any of them, whereby their waters are combined and thrown upon the lands of a private proprietor, creates a continuing nuisance, and if the owner of the lands at the time the railway was built subsequently conveys them, his grantee is entitled to maintain an action for damages suffered after his conveyance was executed, by the overflow of water and the depositing of sand on such land. *Wells v. New Haven etc. Co.*, 423.
3. **PRESCRIPTIVE RIGHT TO MAINTAIN.** — If an act is wrong at the outset, its continuance cannot become rightful, and if its continuance will occasion damages varying in quantity with the seasons, it is a continuing nuisance and an invasion of plaintiff's right from day to day, and he may select his own time for bringing an action therefor, and is not barred by the lapse of six years from the erection of the structure constituting the nuisance, though it is of a permanent character. *Id.*
4. **PARTIES MAINTAINING NUISANCE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES RESULTING THEREFROM WHEN.** — Persons who by their several acts or omissions maintain a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it. Where, therefore, three several owners of adjoining lots on a city street permit a brick wall extending along the fronts of their several lots to remain in a leaning, unsafe, and dangerous condition, after the buildings of which they were a part had been burned down, and such wall falls upon and kills a person who was lawfully standing on the sidewalk adjacent thereto, all of said owners are jointly

and severally liable, although no part of the wall of one of them touched him. *Simmons v. Everson*, 676.

See EASEMENTS, 1; MUNICIPAL CORPORATIONS, 8, 9.

NUNC PRO TUNC ENTRY.

See PROCESS, 5.

OFFICE AND OFFICER.

1. TRIAL OF TITLE TO OFFICE. — Title to office cannot be tried in an action of replevin for property belonging to the office. *Hallgren v. Campbell*, 557.
2. REMOVAL. — Where an officer is appointed for a fixed term, and the power of removal is not expressly declared by law to be discretionary, he cannot be removed except for cause; and when cause must be assigned for his removal, he is entitled to notice and a chance to defend. *Id.*
3. REMOVAL — PRESUMPTION. — A statutory provision that elective officers shall not be removed except for cause does not raise a presumption of intention that appointed officers may be removed without cause. *Id.*
4. REMOVAL — PRESUMPTION. — The legislature may, by express words, confer upon the common council of a city the power to remove an officer without cause; but in the absence of such power given in express words, the presumption is, that the legislature intended that every officer appointed for a fixed term should be entitled to hold his office until the expiration of such term, unless removed therefrom for cause after a fair trial. *Id.*
5. REMOVAL — OFFICER DE FACTO. — One who has lawfully been in office, and has been recognized as the officer *de facto*, and not lawfully removed, indicates his claim to hold the office by his refusal to deliver up the property, books, and papers belonging thereto; and if he has never yielded, but has continued to act, then a subsequent appointee to the office, who has never had possession, cannot be regarded as an officer *de facto*. *Id.*

See QUO WARRANTO.

OFFICIAL BONDS.

See NOTARIES PUBLIC, 1-4.

ORDINANCES.

See CRIMINAL LAW, 14, 15; MUNICIPAL CORPORATIONS, 6-11.

PARENT AND CHILD.

See EVIDENCE, 12.

PAROL EVIDENCE.

See EVIDENCE, 9-15; HUSBAND AND WIFE, 9; JUDGMENTS, 17; PARTNERSHIP, 2.

PARTIES.

See EJECTMENT, 1.

PARTITION.

1. PARTITION MAY BE MADE SO AS TO PROTECT those who may be benefited incidentally, as, for instance, grantees in severalty of some of the co-

tenants, where they can be protected without prejudicing the rights of other tenants in common. *Barnes v. Lynch*, 470.

2. **SEPARATE SUITS OF PARTITION OF FOUR SEPARATE PARCELS OF LAND SITUATE IN THE SAME COUNTY** will not be allowed, though one of the co-tenants, claiming to own the land in severalty, has conveyed three different parcels of it to as many different persons. *Id.*
3. **PARTITION OF A PART OF THE COMMON LANDS, ALL OF WHICH ARE SITUATE IN THE SAME COUNTY**, cannot be enforced except by the consent of all the co-tenants; and though one parcel of such land may have been conveyed by one of the co-tenants purporting to convey it in severalty, his grantee is entitled to insist that no partition be made except of all the lands of the co-tenancy. Such partition is of advantage to him, because it may result in the setting off to his grantor of the part so conveyed in severalty, and the operation of the conveyance, by way of estoppel, so as to give a perfect title to the grantee. *Id.*
4. **REVERSAL OF A JUDGMENT IN PARTITION**, so far as it affects plaintiff's right to have partition of certain designated tracts of land, though it is affirmed in all other respects, vacates the whole judgment as to those tracts, and as to them releases all the parties to the action from the operation thereof. *Reinhart v. Lugo*, 52.

PARTNERSHIP.

1. **EVIDENCE, WHEN INADMISSIBLE TO SHOW PROPERTY TO BE FIRM ASSETS.** — As against purchasers and lien creditors dealing with the owners of land on the faith of a recorded title, and without notice that it is different from what it appears of record, parol evidence is inadmissible to show that although the land was conveyed to the grantees as individuals, yet it was held by them as partnership property. *Collner v. Greig*, 899.
2. **LAND, WHEN REGARDED AS FIRM ASSETS.** — As between partners, land treated by them as partnership property, especially if purchased and paid for with partnership money, is regarded as firm assets, notwithstanding it was conveyed to the grantees as tenants in common. Whether it is partnership realty is a question of intention, which may be manifested by acts and declarations, and established by parol evidence. *Id.*
3. **PARTNERSHIP PROPERTY — INTEREST ACQUIRED BY FIRST PURCHASER.** — A conveyance by one partner, with the consent of the others, of all his interest in the firm and its assets, to a third party, vests in the purchaser all the retiring partner's interest in the firm assets, including its real estate; and if such retiring partner afterwards conveys his interest in the firm real estate to another, without consideration, the second purchaser acquires no higher right than his grantor had, and no interest which he can enforce in ejectment against the first purchaser. *Id.*
4. **DEATH OF PARTNER PUTS AN END TO THE COPARTNERSHIP**, and the surviving partner has no authority to carry on for the future a partnership trade or business, or to engage in new transactions, contracts, or liabilities on account thereof. *Durant v. Pierson*, 686.
5. **SURVIVING PARTNER IS ENTITLED TO THE POSSESSION AND CONTROL OF THE JOINT PROPERTY** for the purpose of closing its business, and to that end may administer the affairs of the firm, and by sale, mortgage, or other reasonable disposition of the property make provision for meeting its obligations. He may, for that purpose, borrow money, and give a valid pledge of co-partnership property for its repayment. *Id.*

6. **SURVIVING PARTNER'S POWER TO BORROW MONEY TO PAY DEBTS OF CO-PARTNERSHIP.** — A surviving partner may in good faith borrow money for the express purpose of paying the debts of his firm, and where a person in good faith lends money to a surviving partner, and the money is faithfully applied by such partner in satisfaction of the liabilities of the firm, the claim becomes one which in equity should be paid out of the assets of the firm, and equity will recognize the right of the surviving partner to have the money so borrowed and applied by him repaid out of the assets of the firm, and an assignment by him for the benefit of creditors which so directs is not fraudulent. *Id.*

PATENTS (FOR INVENTIONS).

PATENT MEDICINE. — THERE CAN BE NO EXCLUSIVE RIGHT to the use of formulas for the manufacture of medicines, though there may be a right to prevent any one from obtaining or using them through breach of trust or of contract. Any one who honestly gets a knowledge of such formulas has the right to make and sell medicines therefrom, and to publish to the public that they are made according to such formulas. *Chadwick v. O'Connell*, 442.

See TRADE-MARKS.

PAYMENT.

See BANKS AND BANKING, 1-7.

PERSONAL PROPERTY.

BODIES OF THE DEAD BELONG TO THE SURVIVING RELATIVES, in the order of inheritance, like other property, and such relatives, and not the executor or administrator, have the right to the custody and burial thereof. *Bensham v. Wright*, 249.

PERPETUITIES.

See WILLS, 15-17.

PHYSICIANS AND SURGEONS.

See DENTISTRY.

PLEA IN ABATEMENT.

See ABATEMENT, 2.

PLEADING.

1. **PLEA OF SATISFACTION INSUFFICIENT WHEN.** — Where the complaint in an action alleges that the plaintiffs employed the defendants to take care of and safely keep in a secure vault the body of their deceased daughter until they should be prepared to inter the same; that the defendants did not safely keep said remains, but carelessly and negligently took or allowed the same to be taken and buried, or otherwise disposed of, and wrongfully refused to inform the plaintiffs where said remains had been removed to, — an answer alleging that the defendants, by mistake, had shipped the body to some point of interment not remembered by them at the time the plaintiffs demanded the body; that they so notified the plaintiffs, and promised them to immediately find and return the

body; that the plaintiffs expressed themselves as satisfied with this arrangement; that shortly afterwards the defendants returned the body, which was taken and interred by the plaintiffs; and that the return of the corpse was taken and received by the plaintiffs in full and perfect satisfaction of all wrongs and injuries incident to the mistake made by the defendants — is bad, because it makes no averment that the plaintiffs agreed with the defendants that they would accept such return in satisfaction of the cause of action alleged in the complaint. The averment at the close of the answer, that the return was so received and accepted, is a statement of a mere conclusion, not warranted by any premises preceding it. *Reishan v. Wright*, 249.

2. **ADMISSION BY PLEA AS EVIDENCE.** — A plea bearing on the main issue in the case, and containing an admission by defendant calculated to damage his case, has the effect of making such admission evidence against him upon the trial of any other plea in the same case. *Howard v. Glenn*, 156.
3. **ADMISSION BY PLEA, WHEN ADMISSIBLE AS EVIDENCE.** — In an action by the creditors of a corporation to recover from a stockholder therein the amount of his unpaid stock subscription, the main issue being whether or not he was a subscriber, and one of his pleas admitting that he did subscribe to the stock of a corporation proved to be the same as that in the name of which suit is brought, such admission can be used as evidence against him in the trial of the other pleas. *Id.*

See ACTIONS, 1, 3; FRAUD; LIBEL AND SLANDER, 30; LIMITATIONS OF ACTIONS, 3; NEGOTIABLE INSTRUMENTS, 1; STATUTE OF FRAUDS.

POWER OF ATTORNEY.

See ASSIGNMENT, 5; JUDGMENTS, 14.

PRESCRIPTION.

See NUISANCES, 3.

PRESUMPTIONS.

See ATTACHMENT AND GARNISHMENT, 3; BANKS AND BANKING, 1; CARRIERS, 2; CRIMINAL LAW, 5, 22; HOMETEAD, 3; JUDGMENTS, 20; NEGLIGENCE, 5; OFFICER AND OFFICERS, 3, 4; SALE, 6, 15; TELEGRAPH COMPANIES, 2; WILLS, 3-5.

PRINCIPAL AND AGENT.

See AGENCY.

PRIORITIES.

See MORTGAGES, 2, 3.

PROCESS.

1. **RETURN OF SERVICE OF SUMMONS** signed by a person without adding any official title or designation, and not sworn to, is a nullity, and cannot be validated by proving that he was in fact a deputy sheriff. *Reinhart v. Lugo*, 52.
2. **JUROR'S SUMMONS IN ACTIONS COMMENCED** under a statute authorizing its service in an adjoining county, when the demand sued on is principally for labor and services, must be directed to an officer of that county, otherwise the judgment is void. *Antcliff v. June*, 523.

3. SERVICE OF SUMMONS ON NON-RESIDENT DEFENDANTS in an action to determine conflicting claims of title to real estate is as effectively authorized by a general statute applicable to all classes of actions as by a statute relating only to actions of the class in question. *Perkins v. Wakeham*, 67.
4. NOTICE BY PUBLICATION, WHEN SUFFICIENT. — Notice by publication is sufficient, where the proof shows that three full weeks of publication expired more than thirty days before the first day of the term at which the non-resident defendant was notified to appear. *Horn v. Indianapolis Nat. Bank*, 231.
5. NUNC PRO TUNC ENTRY OF ORDER FOR PUBLICATION MAY BE MADE WHEN. — A *nunc pro tunc* entry of the order for publication of notice may be properly made at any time before final judgment is entered. *Id.*
6. WAIVER OF SERVICE. — A non-resident who voluntarily appears by counsel, and without interposing any objection to the jurisdiction of the court pleads to the merits of the case, thereby waives service of the complaint upon himself. *Hausman v. Burnham*, 74.

See ACTIONS, 4, 5; JUDGMENTS; JURISDICTION, 2, 3.

PROHIBITION, WRIT OF.

See JUDGMENT, 2.

PUBLIC POLICY.

See CONTRACTS, 5.

PUBLICATION.

See PROCESS.

QUIET TITLE.

See JUDGMENTS, 5.

QUO WARRANTO.

It was alleged in the petition that the defendants, as commissioners of Summit County, usurped, assumed, and exercised the power to loan the money that was or might be in the county treasury of that county. The defendants, in their answer, alleged that as such commissioners they are exercising such power under and by virtue of an act of the general assembly. The state demurred to the answer, claiming that the statute was unconstitutional. *State v. Elliot*, 772.

RAPE.

See CRIMINAL LAW, 27.

RAILROAD COMPANIES.

1. RAILROAD COMPANY, WHEN LIABLE FOR NEGLIGENCE OF LEASING CONSTRUCTION COMPANY — Where a contract between a railroad company and a construction company permits the latter to operate the road and to receive its earnings for two years from the time of the making of the contract, the railroad company is liable for injuries inflicted through the negligence of the construction company during that period. *Ottawa &c. R. R. Co. v. Liddell*, 169.

2. **RIGHT OF WAY — EJECTMENT BY REAL OWNER.** — Where a railroad company relies only upon a grant of a right of way from an alleged owner in entering upon land to construct its road, the subsequent grantee of the real owner may maintain ejectment against the company, and upon the recovery of judgment, execution should be stayed a sufficient time to permit the company to obtain the right of way under its power of eminent domain. *Richards v. Buffalo etc. R. R. Co.*, 892.
3. **ESTOPPEL — RIGHT OF WAY — EJECTMENT BY REAL OWNER.** — Where a railroad company, at the time of procuring a grant of a right of way from an alleged owner, had knowledge that another was the true owner of the land, the latter may subsequently assert title and maintain ejectment against the company; nor is he estopped by the fact that he was present when the grant was made, and encouraged its execution by his words or his silence, and afterwards permitted the company to construct and operate its road for eleven years without objection. *Id.*
4. **RIGHTS AND OBLIGATIONS AT HIGHWAY CROSSINGS.** — Where a railroad crosses a highway on the same level, those traveling on either have a legal right to pass over the crossing, and to require due care on the part of those traveling on the other, to avoid a collision. The train, however, has the preference and right of way, but is bound to give due warning of its approach, so that a wagon on the highway may stop, and it is bound to use every exertion to stop if the wagon is inevitably in the way. Hence it is negligence on the part of the railroad company to fail to give such warning by sounding the engine whistle at the distance from the crossing required by the rules of the company. *Brown v. Texas etc. R'y Co.*, 374.
5. **DUTY OF TRAVELER ON HIGHWAY TO LOOK AND LISTEN FOR APPROACH OF RAILWAY TRAINS.** — The law requires a traveler, before crossing a railroad track on a public highway, to look and listen for the approach of trains, and if he omits to do so, and suffers injury while crossing, he cannot recover. In an action to recover damages for injuries so sustained, the plaintiff must show that he did his duty in this respect, or at least prove facts from which the inference can reasonably be drawn that he did. It will not be presumed that he looked; it must be proven. Evidence that a person, killed by a locomotive while crossing a track on a highway, turned his face towards the approaching engine when he was eleven feet from the track on which it was running, but passed on, without again turning his head in that direction, until he was struck, is not sufficient to justify the jury in finding that he did look, and thus observed that measure of care and caution which the situation imposed. But even if it could be inferred that he looked when at that point, to look then, and not again, and to go on from that point without observing the further precaution of watching for the approach of trains upon tracks almost constantly in use, was not a proper observance of that care which it was his duty to exercise. *Tucker v. New York etc. R. R. Co.*, 670.
6. **COLLISION — NEGLIGENCE IN FAILING TO LOOK AND LISTEN.** — One who is traveling on a highway, and crossing a railway track on a common level, is bound to exercise ordinary care and due diligence under all circumstances, to ascertain whether a train is approaching and to avoid a collision; and if before attempting to cross, and being in possession of all his senses, he fails to look and listen, he is guilty of such contributory negligence as will preclude his recovery for an injury sustained from a collision with the train. *Brown v. Texas etc. R'y Co.*, 374.

7. **NEGLIGENCE OF COMPANY WILL NOT EXCUSE NEGLIGENCE OF HIGHWAY TRAVELER IN FAILING TO LOOK AND LISTEN.** — The neglect of a railroad engineer to sound the whistle or ring the bell on nearing a highway crossing will not relieve a traveler on the highway from the necessity of taking ordinary precautions for his safety, nor will it excuse his contributory negligence in failing to look and listen before attempting to cross the railroad track. *Id.*
8. **NEGLIGENCE — DUTY OF TRAVELER TO STOP, LOOK, AND LISTEN.** — A traveler by vehicle on a highway, about to cross a railway track at a public crossing, who can obtain a view of track up and down without alighting, need not alight and go upon the track to look and listen for approaching trains before attempting to cross. The question whether or not, in a given case, the traveler stopped at the best place to look and listen is necessarily one of fact to be determined by the jury. *Ellis v. Lake Shore etc. R. R. Co.*, 914.
9. **NEGLIGENCE — DANGEROUS CROSSINGS — RATE OF SPEED.** — Where a railroad crossing is dangerous, the company does not perform its whole duty to travelers in the highway by sounding the whistle and bell at a proper distance as the train approaches such crossing. It owes the additional duty to such travelers to pass such crossing at a reasonable rate of speed, proportioned to the danger, and is guilty of negligence in crossing at a high rate of speed. *Id.*
10. **NEGLIGENCE IS ABSENCE OF CARE, ACCORDING TO CIRCUMSTANCES,** and must be measured by the apparent danger; and while a high rate of speed by railroad trains is allowable in rural districts, the same rate of speed may be attended with peril to life in more thickly populated sections and at dangerous crossings, and may constitute negligence. *Id.*
11. **LIABILITY FOR KILLING ANIMALS UPON TRACK.** — Where a railway passes through a level country it is not enough that the servants in charge of a train use diligence to avert injury after they see an animal upon the track; but it is their duty to keep a vigilant lookout for objects and animals approaching or in dangerous proximity to the track, and if the circumstances indicate that there is danger that they will get upon the track, to use the means which they possess, such as sounding the whistle and ringing the bell, for driving them away. *Missouri P. R'y Co. v. Gedney*, 286.

See CARRIERS; DAMAGES, 3, 4; EVIDENCE, 3; MASTER AND SERVANT.

RECEIVERS.

APPOINTED IN SUPPLEMENTARY PROCEEDINGS, POWERS AND RIGHTS OF. — A receiver appointed in supplementary proceedings under the code is vested with the legal title to all the personal property of the judgment debtor, and has the right to prosecute all actions to set aside all transfers of property made by the debtor to defraud his creditors. For the purpose of maintaining such actions he represents the creditors, and possesses the same rights as the creditor under whose judgment he was appointed would himself have had. *Mandeville v. Avery*, 678.

RECORD.

See HOMESTEAD, 2.

REDEMPTION.

See JUDICIAL SALES; MORTGAGES, 3.

RELEASE.

See JOINT LIABILITY.

REPLEVIN.

See OFFICE AND OFFICER, 1.

RES GESTÆ.

See CRIMINAL LAW, 1; EVIDENCE, 3-6.

RES JUDICATA.

See JUDGMENTS.

REVIEW.

See APPEAL AND ERROR.

RIPARIAN RIGHTS.

See MUNICIPAL CORPORATIONS, 1-3; WATERCOURSES.

SALES.

1. AGREEMENT TO YIELD PROPERTY IN EXCHANGE FOR PROPERTY — CONTRACT OF SALE NOT BAILMENT. — An agreement by which one party agrees to deliver to another wheat, for which the latter is to deliver, on request, a designated number of pounds of flour and bran for each bushel of wheat delivered, is essentially a contract of sale, and not of bailment. The party delivering the wheat is not entitled to the flour and bran produced from the wheat delivered by him to the other party, and the latter does not undertake to restore the wheat either in its original or in its altered form. If, therefore, a person agrees to furnish to a miller wheat for which the latter agrees to deliver to him, on request, a designated number of pounds of flour and bran for each bushel of wheat delivered, the flour and bran to remain in the possession of the miller, subject to delivery upon demand of the other party, and before the delivery of all the flour and bran the miller's mill and warehouse, with their contents, are, without his negligence or wrong, consumed by fire, the miller will be liable to such other party for the flour and bran which had not been delivered. *Woodward v. Semans*, 225.
2. POTENTIAL EXISTENCE. — Where a contract of sale and purchase relates to the fruit which shall grow on a seller's trees during the five years succeeding that in which the contract is made, such fruit must be regarded as having a potential existence sufficient to support the contract of sale. *Cutting P. Co. v. Packers' Exchange*, 63.
3. SALE OF CHATTEL, WHEAT CONSTITUTES. — A sale of a chattel is the transfer of the property in it for a consideration, and is ordinarily effected by the delivery of the thing sold to the buyer, and the delivery of the price or a security therefor to the seller. *Stephens v. Gifford*, 866.
4. SALE OF CHATTEL INJURIOUS TO THIRD PARTY VOID. — Parties to a sale of a chattel may make such terms and conditions as are convenient to them, but when such terms and conditions are prejudicial to others, or are calculated to mislead the public, they are void as to those who would otherwise be injuriously affected by them. *Id.*
5. SALE OF CHATTEL — RETENTION OF TITLE BY SELLER — INVALIDITY AS TO INNOCENT THIRD PARTIES. — The title to a chattel sold may remain in

- the seller as security for the purchase price by agreement of the parties, and so long as the rights of innocent third parties are not affected, it may be enforced according to its terms; still, as to innocent purchasers from and creditors of the buyer, such agreement gives him a deceptive appearance of ownership and a false credit, and will be disregarded. *Id.*
6. SALE OF CHATTEL — POSSESSION AS PRESUMPTION OF OWNERSHIP. — When one has possession of personal property, those who deal with him on the credit thereof must inquire into the origin and nature of his possession as to whether or not he is a purchaser or a bailee, and when it is learned that he is a purchaser, his continued possession raises a presumption of continued ownership which is conclusive in favor of *bona fide* purchasers and creditors. *Id.*
 7. SALE OF CHATTEL — RETENTION OF TITLE — RIGHT OF INNOCENT PURCHASER. — Where the owner of goods sells them to one party and retains the possession, afterwards selling them to another innocent purchaser, who takes possession, the first purchaser loses his title, no matter if he acted in good faith, paid a fair price, and left the goods with the seller because of his confidence in and desire to aid him. *Id.*
 8. SALE OF CHATTELS — RETENTION OF POSSESSION AS EVIDENCE OF FRAUD. — Retention of possession by the seller, upon a sale of chattels, is not merely evidence of fraud, but in itself makes the transaction fraudulent as to subsequent *bona fide* creditors and purchasers from him. *Id.*
 9. SALE OF CHATTELS — CHANGE OF POSSESSION, HOW DETERMINED. — In deciding the sufficiency of possession taken by the purchaser of a chattel, to protect him against subsequent purchasers or creditors in good faith, the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business must all be considered. *Id.*
 10. SALE OF CHATTELS — SUFFICIENCY OF CHANGE OF POSSESSION. — The purchaser of goods must, for the protection of himself and the public, take such possession as is usual and reasonable, in view of all the circumstances of his purchase, where the property is capable of delivery; and as between himself and subsequent purchasers in good faith and creditors, he must bear the loss of his neglect in this respect. *Id.*
 11. SALE OF CHATTELS — SUFFICIENCY OF CHANGE OF POSSESSION. — A sale of horses and a wagon and harness under an arrangement by the purchaser with the seller that the former should have the use of the stable where they were kept, and should continue to care for them until ready to remove them, with no other change of possession, is fraudulent and void as against a subsequent execution creditor of the seller. *Id.*
 12. SALE OF GOODS BY SAMPLE — MEASURE OF DAMAGES FOR BREACH OF WARRANTY. — Where goods are sold by sample, with a warranty of quality, and are retained by the purchaser, the measure of damages for a breach of the warranty is the difference between the market value of the goods contracted for and of the goods delivered; and in an action for the price of the goods, the purchaser may interpose this difference as a defense *pro tanto*. *Ogden v. Beatty*, 862.
 13. SALE OF GOODS BY SAMPLE — SUFFICIENCY OF AFFIDAVIT OF DEFENSE IN ACTION FOR PRICE. — An affidavit of defense, setting up a breach of warranty in a sale of goods by sample, in an action for their price, must contain a clear and concise statement of the facts which constitute a basis for the assessment of damages under the rule by which they are measured. All the elements of the defense must appear with reason-

able certainty in the affidavit, and if any fact essential to complete such defense is omitted, the affidavit is insufficient. *Id.*

14. **SALE OF GOODS BY SAMPLE — SUFFICIENCY OF AFFIDAVIT OF DEFENSE IN ACTION FOR PRICE.** — An affidavit of defense, setting up a breach of warranty in a sale of goods by sample, in an action for their price, alleging great loss by reason of claims made by customers, and their cancellation of contracts because of the low grade and inferior quality of goods furnished, is insufficient, as failing to state the essential facts upon which to constitute a basis for the assessment of damages. Such affidavit should at least state the quantity, market price, and difference in quality of the goods purchased, and of the goods delivered. *Id.*
15. **SALE OF GOODS BY SAMPLE — PRESUMPTION AGAINST PURCHASER.** — In an action for the price of goods sold by sample, it will be presumed, in the absence of averment and proof to the contrary, that the goods were inspected by the purchaser when he received them, and that he knew their grade and quality, and made no complaint as to either. *Id.*
16. **FRAUD OF VENDOR IN MISREPRESENTING QUANTITY.** — If the owner of carpets covering the floors of twelve rooms, besides the hall and stairs of a dwelling-house, knowingly and falsely represents, as of his own knowledge, that they contain a certain number of yards of material, to an intending purchaser, who, in reliance upon such representation, purchases the carpets, the vendee is liable for his misrepresentations. The purchaser was not bound to measure the carpets for himself, or to avail himself of other opportunities of ascertaining the quantity. *Lewis v. Jewell*, 454.

See ASSIGNMENT, 1, 2; FRAUDULENT CONVEYANCES.

SEPARATE ESTATE

See HUSBAND AND WIFE, 14-17.

SET-OFF.

See BANKS AND BANKING, 5; HOMESTEAD, 4; MUNICIPAL CORPORATIONS, 12-14.

SHERIFFS.

1. **SHERIFF AND DEPUTY.** — ACT OR RETURN OF A DEPUTY is a nullity unless done in the name and by the authority of the sheriff. *Reinhart v. Lugo*, 52.
2. **COLLATERAL IMPEACHMENT OF RETURN.** — A sheriff's return, though false, cannot be impeached in a collateral proceeding for the purpose of setting aside or of getting rid of a judgment authorized by such return. *Thomas v. Ireland*, 356.

See JUDGMENTS, 10; JUDICIAL SALES, 2; MORTGAGES, 4; PROCESS.

SLANDER.

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. **OF CONTRACT TO CONVEY LAND — DEED WITH BUILDING RESTRICTIONS.** — A contract for the conveyance of city land, providing that the deed therefor shall be subject to certain house hire and building restrictions,

to the effect that the house to be erected shall be at least two stories high, and not less than twenty feet from the front line of the lot, will be specifically enforced as made; and the vendee is not entitled to a deed free from such restrictions upon performance of the other conditions in the contract. *Abraham v. Stewart*, 535.

2. **VENDOR AND VENDEE — COSTS.** — A vendor, in an action to enforce specific performance of a contract to convey, will not be allowed costs when, for frivolous reasons, he refuses to execute a conveyance, though there is reason to refuse to execute the conveyance as demanded by the vendee. *Id.*
3. **PARTY SEEKING, MUST DO EQUITY.** — Specific performance is not of right, but of grace, and one seeking such relief in equity must show himself ready and willing to do all that he ought in good conscience to do, and if he does not, his bill will be dismissed. *Dats v. Phillips*, 864.
4. **WHEN WILL NOT BE GRANTED.** — Where a contract is not fair or the conduct of the party seeking its specific performance is not just and conscionable, or there are independent circumstances which will render the operation of a decree of specific performance harsh and inequitable, the parties will be left to their remedy at law. *Id.*
5. **WHEN WILL NOT BE GRANTED.** — Specific performance of an agreement to close windows in a party-wall, upon receiving one year's notice and one half the cost of erecting the wall, will not be granted in favor of a party who has violated his part of the agreement to furnish the building of defendant with certain sewer connections, in consideration of a surrender of an easement in plaintiff's land. *Id.*

STATES.

1. **JUDGMENTS — SEIZURE OF STATE PROPERTY TO SATISFY JUDGMENT AGAINST STATE.** — Consent to execute the judgment rendered, by seizure and sale of the property of the state, is not implied by and does not follow from consent given by statute to maintain suit against the state. If such consent were expressly given by the statute, it would be unconstitutional and void. Such a judgment is without compulsive force, and the only recourse for its satisfaction is by application to the legislature. *Carter v. State*, 404.
2. **STATUTE AUTHORIZING SUIT AGAINST STATE** has no effect beyond referring to the judiciary, for settlement, the questions of law and fact involved in the claims, and the determination, in the form of a judgment, of the rights of the parties. It does not authorize a seizure of state property to satisfy such judgment, and only conveys an implication that the legislature will recognize such judgment as final, and make provision for the satisfaction thereof. *Id.*

STATUTE OF FRAUDS.

- DEFENSE OF STATUTE OF FRAUDS WAIVED BY FAILURE TO SET IT UP IN ANSWER WHEN.** — Where it does not appear on the face of the complaint that the agreement sought to be enforced by the action is one prohibited by the statute of frauds, such defense cannot be made available unless it is set up in the answer. *Hamer v. Sidway*, 693.

STATUTES.

1. **CONSTITUTIONAL LAW.** — **TITLE OF STATUTE** and the act itself must correspond, not literally, but substantially, and this correspondence is to be

determined in view of the subject-matter to which the legislation relates; and when the title of an act indicates that a thing is to be or may be done, it is no variance from it for the body of the act to provide that the thing shall be done, or not done, on some condition. *Macon etc. R. R. Co. v. Gilson*, 135.

2. WHETHER STATUTES ARE LAWS OF GENERAL NATURE, or not, depends upon their subject-matter, and not upon their form. *State v. Ellet*, 772.
3. LAW GENERAL IN FORM, BUT LOCAL IN APPLICATION, VOID.—A law general in form and purporting to apply to all counties of a designated class, and to establish for them a general system of law regulating the custody, investment, and disbursement of their public funds and revenues, but which in fact can never operate but in one county in the state, is local and void as being in conflict with the constitutional provision that "all laws of a general nature shall have a uniform operation throughout the state." *Id.*
4. CONSTITUTIONAL LAW, WHEN MANDATORY.—A constitutional provision that "all laws of a general nature shall have a uniform operation throughout the state" is mandatory, and not directory merely. *Id.*
5. JUDGMENT IMPAIRING OBLIGATION OF CONTRACT.—In order to constitute a judgment subject to review as impairing the obligation of a contract, the case must involve the constitution, or a statute, or some enactment that has the force of law, either of the state or of some municipality exercising legislative power delegated by the state, which impairs the obligation of such contract. *Ray v. Western Pa. Nat. Gas Co.*, 922.
6. INTOXICATING LIQUOR, STATUTE COMPELLING DISCLOSURE OF PERSON FROM WHOM PROCURED.—A statute requiring defendant, after conviction of intoxication, to disclose, "under oath, when, where, how, and from whom he procured the liquor by which his intoxication was produced," and providing that upon his refusal to make such disclosure "it shall be the duty of the magistrate before whom such trial is had to commit the accused for contempt of court," is not unconstitutional as being contrary to public policy and natural justice, nor as depriving the accused of the right to a trial by jury, nor as depriving him of liberty without due process of law, nor as denying him the equal protection of the laws, nor as making that a contempt of court by statute which is not proper matter for contempt. *In re Clayton*, 123.

See CARRIERS, 1; DENTISTRY; TELEGRAPH COMPANIES, 7-10.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STIPULATIONS.

See CONTRACTS, 8.

STOCKHOLDERS.

See CORPORATIONS, 7-23.

STREET-CARS.

See MUNICIPAL CORPORATIONS, 7-9.

SUBROGATION.

See SURETYSHIP, 2, 3.

SUMMONS.

See PROCESS.

SURETYSHIP.

1. JUDGMENT AGAINST A SURETY IS PRIMA FACIE EVIDENCE AGAINST HIS PRINCIPAL of the amount which the latter is liable to pay, but is not conclusive. *Knickerbocker v. Wilcox*, 595.
2. SUBROGATION, DOCTRINE OF, WHEN APPLIED. — To justify the application of the doctrine of subrogation, a person must have paid a debt due to a third person, for the payment of which another was in equity primarily liable; and the person paying the debt must, in doing so, have acted under the compulsion of saving himself from loss, and not as a mere volunteer. *Opp v. Ward*, 220.
3. GUARANTOR OF JUDGMENT CREDITOR ENTITLED TO SUBROGATION TO RIGHTS OF SURETY ON APPEAL BOND WHEN. — Where a person becomes guarantor for a lessee, and the lessor recovers judgment against the lessee for his failure to perform the covenants guaranteed, and the lessee appeals from this judgment, which is affirmed, and the lessor then sues the guarantor, and recovers judgment against him for the rent of the demised premises from the date of the rendition of the judgment against the lessee up to the time of his death, which judgment the guarantor pays, the lessee having paid the judgment against himself, the guarantor is entitled to recover the amount so paid by him from the surety on the appeal bond, and no demand before suit is necessary. The interposition of the second surety having been the means of involving the first in the liability which he was ultimately compelled to pay, the equity of the first is complete, and he is entitled, on the principles of subrogation, to stand as though the creditor had assigned the appeal bond to him. If the first surety suffers loss or his liability is increased or prolonged so as to render him liable to suffer loss by the intervention of the second, the latter assumes all the risk resulting from his voluntary interposition. *Id.*

See ASSIGNMENT, 2; ATTACHMENT AND GARNISHMENT, 1-3; NOTARIES PUBLIC, 1-4.

TAXATION.

1. TAXATION OF CORPORATION. — No exemption of a particular corporation from taxation can be implied from the mere fact of the payment of a bonus by it for its franchise. *New Orleans v. Orleans R. R. Co.*, 365.
2. *Id.* — EXEMPTION. — No railroad or other corporation can claim exemption from taxation or from a license, simply because it has paid a bonus for its charter or franchise, in the absence of a stipulation on the part of the state or other taxing power that such bonus was received in lieu of any further or future taxation. *Id.*

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANY'S DUTY IN TRANSMISSION AND DELIVERY OF MESSAGES. — When a telegraph company receives, without conditions, a message for transmission, among other obligations implied is the duty to accurately transmit and deliver to the addressee the message received. It does not insure the accurate transmission and delivery of the message, but it undertakes to exercise due diligence to accurately transmit and deliver it. *Pearsall v. Western Union Tel. Co.*, 662.

2. **PRIMA FACIE EVIDENCE OF NEGLIGENCE IN FAILING TO PROPERLY DELIVER TELEGRAPHIC MESSAGE.** — In an action against a telegraph company to recover damages for failing to accurately or promptly deliver a message, the plaintiff makes out a *prima facie* case of negligence against the company by proving the contract and its breach, without giving evidence of any negligent act of omission or commission on the part of the company or of its agents. *Id.*
3. **ASSENT OF SENDER OF MESSAGE TO CONDITIONS IN BLANK.** — The sender of a telegraphic message who writes the same upon a blank which has printed upon it a condition that "the company will not be liable for damages in any case, where the claim is not presented in writing within sixty days after sending the message," is chargeable with knowledge of, and deemed to assent to, such condition. *Hill v. Western Union Tel. Co.*, 166.
4. **WAIVER OF CONDITION BY AGENT.** — A demand for damages for mistake in the transmission of a telegraphic message is properly made upon the agent on duty at the place from which the message was sent, and though he is not bound to recognize an oral demand, still, if he does so, and makes no objection to it on the ground that it is not in writing, but objects to it on the sole ground that the company is not at fault, he thereby waives, on the part of the company, any right to have the demand made in writing, according to the condition attached to the message as sent. *Id.*
5. **TELEGRAPH COMPANY MAY BY CONTRACT, BUT NOT BY MERE NOTICE, LIMIT ITS LIABILITY.** — A telegraph company incorporated under the general statutes of New York may by contract limit its liability for mistakes or delays in the transmission or delivery, or for the non-delivery, of messages, caused by the negligence of its servants, if the negligence be not gross, to the amount received for sending the message; but it cannot so limit its liability by a mere notice, unless it is brought to the personal knowledge of the sender of the message and he is shown to have assented to it. In respect to the right of telegraph companies to limit their liability by notice, the same rule applies to them that applies to common carriers. *Pearsall v. Western Union Tel. Co.*, 662.
6. **MEASURE OF DAMAGES FOR FAILURE TO PROPERLY DELIVER TELEGRAPHIC MESSAGE.** — Where a member of a firm of stock-brokers delivers to a telegraph company a message directed to his firm, ordering it to buy certain shares of stock, but the operator negligently transmits the message directed to such member of the firm individually, in consequence of which the message remains unopened until his return home the next day, when he purchases the shares at an advanced price, in an action against the company for the negligent transmission of the message, the measure of damages is the difference between the price paid for the shares and that for which they would have been bought the day before, had the message been accurately transmitted and delivered. *Id.*
7. **INTEREST IN STREETS.** — Statutes authorizing a corporation to construct lines of telegraph along and upon public streets, by the erection of the necessary fixtures, including posts, piers, and abutments for maintaining wires, do not grant any interest in such streets, and at most confer a license to enter thereon for the purposes named, and merely determine that one of the purposes for which the street may be used is the erection of poles and the stringing of wires for the business of telegraphing, and that such use is a public one, not inconsistent with the use of the streets

for general street purposes. The legislature did not intend by these statutes to divest itself, and it could not divest itself, of its control of the streets for the public welfare. The license conferred can be modified or revoked at any time when the public interest may so require. *American Rapid Tel. Co. v. Hess*, 764.

8. GRANT OF THE RIGHT TO USE PUBLIC STREETS TO MAINTAIN AND OPERATE TELEGRAPH LINES is subject to the control and regulation of the legislature. Such grant does not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the public; and if the poles and wires become a serious obstruction and nuisance in the streets, the legislature may take such action, and make such provisions by law, as are useful to remove the nuisance and restore the utility of the streets for public purposes. *Id.*
9. STATUTES REQUIRING THAT TELEGRAPH, TELEPHONE, AND ELECTRICAL WIRES AND CABLES IN CITIES having a population of five hundred thousand shall be placed under the surface of the streets, lanes, and avenues of the city are valid and enforceable, though previous statutes had granted permission to maintain telegraph lines and poles upon the streets of such city. The statute may also require all subways for underground conductors of electricity to be built under the direction of the board of commissioners of electrical subways, and give the board authority to require all owners or operators of electrical conductors aboveground to make connection with such underground subways as shall be determined by the board, and to remove their poles and wires from the streets within ninety days after notice, and in the event of their refusal to make such removal, the authorities of the city may be authorized to do so. *Id.*
10. ACTS OF CONGRESS PURPORTING TO GRANT TELEGRAPH COMPANIES the right to construct and maintain lines of telegraph through, over, and along any of the military or post roads of the United States do not deprive the state of its control over its highways and its right to regulate their use, by the police powers, for the public welfare, and hence do not confer the right to maintain telegraph poles and wires above the surface of the public streets after the enactment of a statute by the state requiring them to be placed underground. *Id.*

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

See MORTGAGES, 6.

TICKETS.

See CARRIERS, 4.

TORTS.

See ACTIONS; DAMAGES, 1, 2; JUDGMENT, 1.

TRADE-MARKS.

TRADE-MARKS, RIGHT TO RESTRAIN USE OF. — WHERE A PATENT MEDICINE is manufactured and sold by a physician, who dies, and another person becomes possessed of his formulas and acquires the right to his trade-mark, he cannot maintain a suit to restrain another person from

making and selling medicines from the same formulas, nor from using the trade-mark, because the only use of a trade-mark, after the death of the original proprietor, is to indicate that the medicines sold are of the same class as those which he manufactured, and therefore one person has no right to enjoin another from using them, where his use is not a fraud upon the public, nor an invasion of the exclusive right of any other person. *Chidwick v. Covell*, 442.

See PATENTS.

TRESPASS.

EQUITABLE RELIEF AGAINST TRESPASS. — Equity may be at once resorted to for appropriate relief when numerous acts of trespass are being committed and their continuance threatened under claim of right, and when the injury arising from each act is trifling, and the damages recoverable therefor inadequate as compared with the expense necessary to prosecute separate actions at law therefor. *Sembeck v. Nye*, 823.

TRIAL.

1. UPON FILING AN AMENDED COMPLAINT in a suit for partition, bringing in new parties under an allegation that they have or claim an interest in the subject-matter of the suit, all defaults previously entered, based upon the original complaint, must be regarded as vacated, and the amended complaint must therefore be served on all parties, whether they are in default as to the original complaint or not. *Reinhart v. Lugo*, 52.
2. RIGHT TO READ FROM LAW BOOK. — On the contest of a will, counsel has no right to read to the jury, in his argument, from a standard law work on wills, as the reading to the court or jury of scientific books recognized as standard authority, when necessary to an understanding of any relevant matter, may be granted or denied, in the sound discretion of the court. *Richmond's Appeal*, 85.
3. SUFFICIENCY OF COMPLAINT MAY BE CONSIDERED ON MOTION FOR A NEW TRIAL if the defendant moved for a nonsuit in the trial court on the ground that the contract set out in the complaint was against public policy, and the motion was denied. *Alpers v. Hunt*, 17.
4. ERROR OF COURT IN DENYING NONSUIT, IF EXCEPTED TO, may be reviewed on a bill of exceptions. *Id.*
5. RIGHT TO EXCEPT TO INSTRUCTIONS. — Litigants cannot be deprived of their right to except to instructions by the court, unless they have expressly requested them. Requests by implication are unknown. *Wilbur v. Stoeckel*, 568.
6. INSTRUCTIONS. — Where there is evidence tending to support both sides of an issue of fact, an instruction thereon should call attention to both classes of the evidence. *Id.*
7. INSTRUCTION EXPRESSING OPINION, ERROR THROUGH LAPUS LINGUE. — In an action to recover damages for personal injury, an expression in a charge, "that these injuries are permanent, and that she will have to suffer the remainder of her life," omitting the word "if," is error, although it appears from the whole charge that the omission was a *lapis lingue*. *Chattanooga etc. R. R. Co. v. Liddell*, 169.
8. WITNESSES, INSTRUCTIONS MAY CALL ATTENTION TO INTEREST OF. — In an action against a railroad company to recover for personal injury received at a public crossing, the instructions may call attention to the interest

of the engineer and fireman of the train, in testifying for the company, if they also call attention to the interest of plaintiff in testifying for himself. *Ellis v. Lake Shore etc. R. R. Co.*, 914.

9. **JURY AND JURORS — RIGHT TO REJECT JUROR WITHOUT CAUSE.** — A court has no right of its own motion to reject a qualified juror with whom the parties are satisfied, unless for sufficient cause, which must appear in the record. *Welch v. Tribune Pub. Co.*, 629.
10. **JURY AND JURORS — SICKNESS OF JUROR MUST BE ESTABLISHED IN PRESENCE OF ACCUSED.** — Where, upon the trial of a person accused of felony, the jury, after hearing the evidence, are allowed to separate and go to their homes, and the inability of a juror to attend because of sickness commencing during the recess is reported to the court, the fact of the sickness of such juror must be established as any other fact is established in a court of justice, in accordance with judicial methods, including the right of the accused to be present, and to introduce evidence and cross-examine witnesses; and it is reversible error for the court, of its own motion, or from mere reports unverified by affidavits or unsupported by oaths administered in open court, and in the absence of the accused, to determine that there exists, because of the sickness of such juror, an unavoidable necessity that the remaining jurors should be discharged without verdict, and by such an arbitrary exercise of judicial discretion deprive the accused of the plea of once in jeopardy. *State v. Smith*, 266.
11. **Id. — RECORD MUST SHOW FACTS AUTHORIZING DISCHARGE OF JURY.** — When an order is made by a trial court discharging a jury without verdict, to which has been committed the question of the guilt or innocence of a person accused of crime, the record must show affirmatively the existence of the fact or facts which induced such order and justified the exercise of such extraordinary power. *Id.*
12. **EVIDENCE — BURDEN OF PROOF.** — When the execution of an instrument sued on is denied by affidavit, the burden of proof is upon the plaintiff throughout the trial, to show the execution of the instrument. This in Michigan, under circuit court rule 79. *Wilbur v. Stoepel*, 568.
See ABATEMENT, 2; AGENCY, 5; APPEAL AND ERROR; INSURANCE, 19.

TRUST AND TRUSTEES.

1. **TRUSTS.** — TO THE CONSTITUTION OF EVERY EXPRESSED TRUST there must be a trustee, an estate to vest in him, and a beneficiary. If property is devised to persons, to hold in trust, for their own benefit, no trust is created, but they take both the legal and equitable estate; for these two estates cannot be separately maintained in the same persons. *Greene v. Greene*, 743.
2. **DECLARATION OF TRUST, WHAT SUFFICIENT.** — Where a person indebted to another in a certain sum of money writes to him recognising the indebtedness; tells him that he will keep the money until he deems him capable of taking care of it; that he shall have it certain; that he does not intend to interfere with it; and that he may consider it on interest, — this is sufficient for the creation of a valid trust which is not within the operation of the statute of limitations. *Hamer v. Tidney*, 693.

See EXHIBITIONS, 2; WILLS, 11.

UNDUE INFLUENCE.

See WILLS.

VENDOR AND VENDEE.

See SALES; SPECIFIC PERFORMANCE, 1, 2.

WAGERS.

See INSURANCE, 5.

WARRANTY.

See NEGOTIABLE INSTRUMENTS, 14-16; SALES.

WASTE.

See CO-TENANCY, 1.

WATERCOURSES.

1. WATER FROM ARTESIAN WELLS — LIABILITY FOR PERCOLATION. — One having artesian wells upon his land, and so using them that the water therefrom forms in a pool and thence percolates beneath the surface so as to injure the lands of an adjacent proprietor, is answerable in damages for the injuries thus occasioned. *Parker v. Larsen*, 80.
2. OWNERSHIP IN NON-NAVIGABLE LAKES — DEDICATION. — A non-navigable inland lake is subject to private ownership; and the owner thereof cannot be deemed to have dedicated it to the uses of boating, hunting, and fishing, simply because he interposed no objection to such use by his neighbors, adjoining proprietors, or strangers. Other circumstances must clearly and satisfactorily appear manifesting an intent on his part to so dedicate it. *Lembeck v. Nye*, 828.
3. DEDICATION OF NON-NAVIGABLE LAKE. — The use of a non-navigable inland lake by the public for the purposes of boating, hunting, and fishing, without the knowledge of the owner, will not establish a dedication of any kind against him, no matter how long continued such use may be. *Id.*
4. RIPARIAN RIGHTS IN NON-NAVIGABLE LAKE. — The public has no right without prescription, as against the owner, to fish in and boat upon the waters of a non-navigable inland lake; nor have adjoining owners, without title in the lake, and without prescription, the right to engage in the business of letting for hire boats and fishing-tackle to such portions of the public as may resort to such lake to boat and fish for their pleasure and recreation. *Id.*
5. RIPARIAN RIGHTS IN NON-NAVIGABLE LAKE. — A riparian owner, by virtue of his ownership to the edge of the water of a non-navigable lake, has access to and the right to use the water thereof for domestic and agricultural purposes. *Id.*
6. RIPARIAN OWNER HAS NO RIGHT TO RETAIN BY MEANS OF A DAM THE WATERS of a natural stream running through his land, and then to discharge them in such quantities into such stream that it is insufficient to carry them, and they therefore overflow the lands of a riparian proprietor below, to his injury. *McKee v. Delaware Canal Co.*, 740.

See DEEDS, 6-10; MUNICIPAL CORPORATIONS, 1-3; NUMBERS, 2.

WIDOWS.

See EXECUTORS AND ADMINISTRATORS, 5-10.

WILLS.

1. **CAPACITY REQUIRED OF A TESTATOR** to make his will valid is, that at the time of its execution he be possessed of sufficient intelligence and memory to fairly and rationally comprehend the effect of what he is doing, and the nature and condition of his property, to understand who are or who should be the natural objects of his bounty, and his relations to them, the manner in which he wishes to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will he is making. *Richmond's Appeal*, 85.
2. **TESTAMENTARY CAPACITY.** — Mere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary capacity, but evidence of such facts, or of any of them, should be submitted to the jury to aid in determining whether or not the testator had sufficient testamentary capacity at the time of executing his will. *Id.*
3. **PRESUMPTION OF UNDUE INFLUENCE.** — When the person who drafts a will or participates in procuring its provisions from the testator also occupies a relation of special confidence toward him, and would not be a beneficiary in the absence of the will, and is specially benefited by its terms, the presumption of undue influence arises, and the burden of proof is on him to show that the will was executed freely and without his influence. In such case, direct and positive proof that the beneficiary took part in procuring from the testator the terms and provisions of the will is not required to raise such presumption; it may be inferred from surrounding circumstances. *Id.*
4. **PRESUMPTION OF UNDUE INFLUENCE.** — The mere existence of a confidential relation will not in all cases necessarily raise a presumption of undue influence in the execution of a will, especially when it appears that the opportunity of familiar and secret communication and intercourse between the testator and the beneficiary, at a time proximate to the execution of the will, is wanting; but when a legacy is given to an attorney, confidential adviser, guardian, or other person sustaining a relation of special confidence to the testator, or when the person who prepares the will or conducts its execution, not being a relative who would, in the absence of the will, be an heir, derives a benefit from its provisions, such presumption may arise from the surrounding circumstances which would justify the jury in finding that undue influence existed, in the absence of rebutting or explanatory proof. The question of undue influence should be left for the jury to determine, under proper instructions. *Id.*
5. **EVIDENCE TO RAISE PRESUMPTION OF UNDUE INFLUENCE.** — On the issue of undue influence in the execution of a will, exercised over the testatrix by a legatee who was her confidential agent, all the facts affecting or attending the relations of the parties, and having a direct, positive, important bearing upon the question, such as the amount, situation, and character of the property with which he was intrusted during any and all portions of his stewardship, as well as the degree of knowledge which the testatrix possessed in regard to the same, and the agent's conduct in imparting information upon the subject to her, or in withholding it from her, are relevant, important, and admissible. *Id.*
6. **OPINION OF MENTAL CAPACITY BY COMPARISON AS EVIDENCE.** — On the issue of undue influence, a witness may give his conception of the testatrix's mental capacity by comparison, and state that it is his

opinion, founded on observation, that such mental capacity was not greater than that of an average child of seven or eight years at the time that the will was executed. *Id.*

7. **REVOCATION OR, BY MARRIAGE.** — A will made by a single woman three days before her marriage, with the consent of her intended husband, who, by antenuptial contract entered into on the day of the marriage, relinquished all interest in her estate, and agreed that she should hold it as her separate property, with power to dispose of it by will, is not revoked by the marriage, as the will, the contract, and the marriage were so nearly and directly connected as to make the whole but one transaction. Section 9 of chapter 13, General Statutes of Kentucky, providing that "every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin," does not apply in such a case. *Stewart v. Mulholland*, 320.
8. **ONCE REVOKED BY MARRIAGE OR OTHERWISE,** a will can only be revived by a valid re-execution. Mere subsequent recognition will not revive it, though it may be an olographic will. *Id.*
9. **JURISDICTION TO CONSTRUE.** — Court of equity has jurisdiction in an action in behalf of the next of kin of a testator to construe a will disposing of personal estate, where the disposition made by the testator is claimed to be invalid and inoperative, though such next of kin claim in hostility to the will. *Real v. Williams*, 748.
10. **IN THE INTERPRETATION OF WILLS, THE INTENTION** of the testator, if discoverable and lawful, must be effected. *Greene v. Greene*, 743.
11. **WHERE THERE IS A DEVISE OF PROPERTY IN TRUST, AND SOME OF THE TRUSTS ARE VALID AND OTHERS ARE NOT,** the property vests in the trustees, the legal estate to be applied to the valid trusts only. *Id.*
12. **WORDS CREATING ONLY LIFE ESTATE.** — A devise to a son, of a farm "for his support, and if he should be spared to have family, I desire the above estate to go to the use of his children," creates only a life estate in the devisee. The word "children," as used, clearly indicates an intention by the testator to use it as a word of purchase, and not of limitation. *Oyster v. Knoll*, 890.
13. **WORD "CHILDREN," IN WILL, IS GENERALLY WORD OF PURCHASE,** and not of limitation; and while it may be used to signify heirs, or heirs of the body, it will not be so construed, unless the testator has employed other words indicative of an intention to use it as a word of limitation. *Id.*
14. **WORDS CREATING ONLY LIFE ESTATE.** — In a devise to a son, of a farm "for his support, and if he should be spared to have family, I desire the above estate to go to the use of his children," the words "for his support" indicate that a life estate is intended, and the words "I desire," as thus employed, are not merely precatory, but are as mandatory as if the words "I will and direct" had been used. *Id.*
15. **PERPETUITIES.** — A PROVISION IN A WILL, SETTING APART A TRUST FUND TO BE PERPETUALLY KEPT by the trustees, and by them applied to cemetery purposes, is void, because it involves an unlawful suspension of the ownership of personal property. *Read v. Williams*, 748.
16. **TRUSTS — PERPETUITIES.** — If a testator devises his property to his sons, upon trust, to pay certain legacies, to manage the estate, to render just

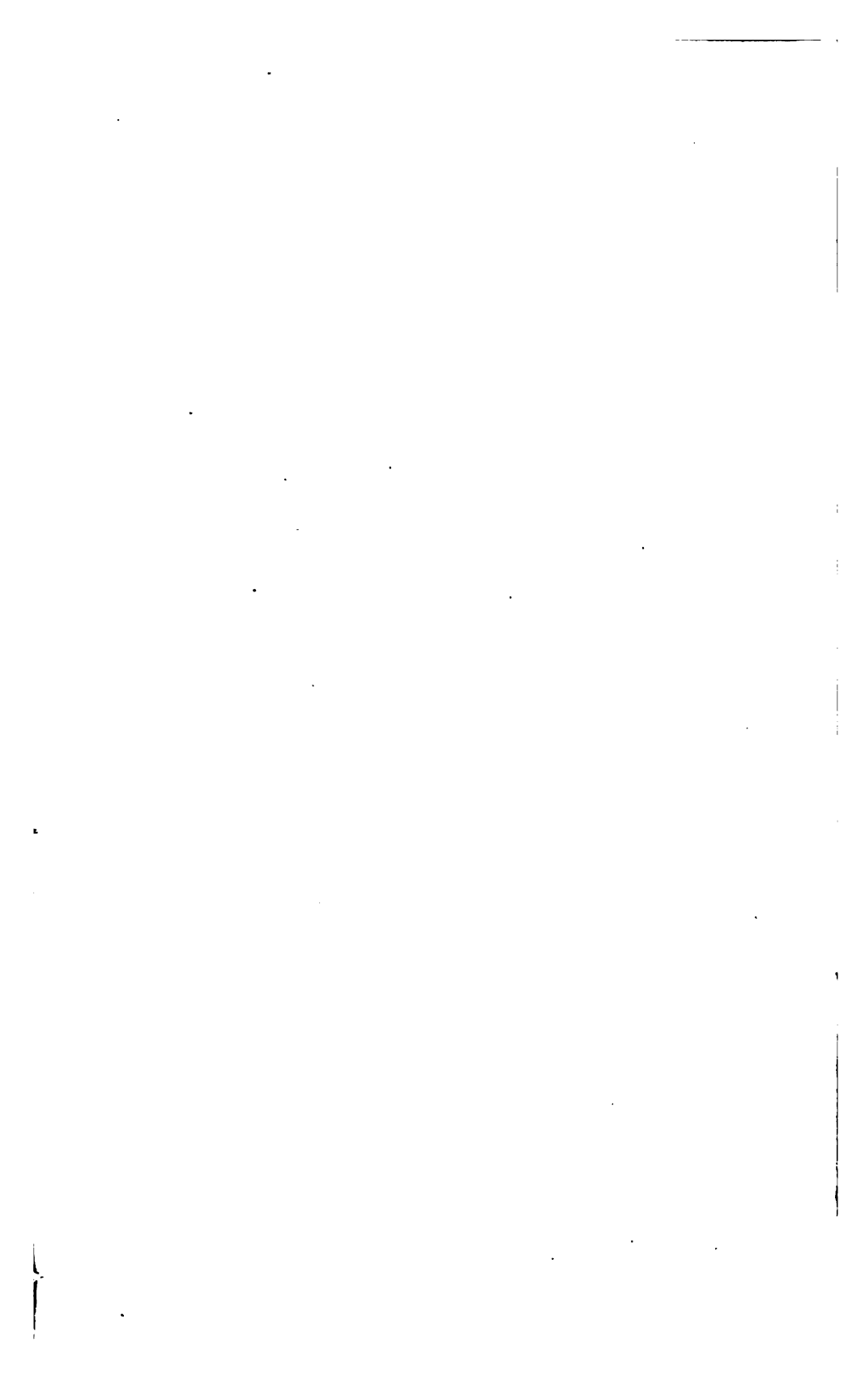
accounts to one another, and to hold the real property for six years without making any partition thereof, and declares that after that period all the property shall belong to them, but that if any of them shall seek partition within the time designated he shall forfeit his share, the will vests the estate in fee in such sons; and the condition against partition, being unlawful, is inoperative, and therefore does not impair the effect of the devise. *Greene v. Greene*, 743.

17. DEVISE VOID FOR WANT OF DESIGNATION OF BENEFICIARIES. — A devise of the residue of testator's property to such charitable institutions and in such proportions as his executors and J. H. shall choose and designate, is void, because it substitutes for the will of the testator the will and discretion of the donees of the power; nor can such will be made valid by the donees of the power designating and thus making certain the beneficiaries. *Read v. Williams*, 748.
18. TRUST ESTATE WILL NEVER BE IMPLIED, WHERE IT WOULD RENDER THE WILL ILLEGAL AND VOID. *Greene v. Greene*, 743.
19. CONTEST OF LOST, DESTROYED, OR SPOILIATED WILL — BURDEN OF PROOF. — Where the contents of a lost, destroyed, or spoliated will have been found, admitted to probate, and recorded by the probate court, the record is *prima facie* evidence in a future proceeding to contest the validity of the will, not only of its due execution and attestation, but also of its contents, and the burden of proof is then upon the contestant of the will to establish its invalidity, by evidence that it had been revoked by the testator by tearing, canceling, obliterating, or destroying it with intention to revoke it. *Behrens v. Behrens*, 820.
20. LOST WILL — PRESUMPTION OF REVOCATION — DECLARATIONS OF TESTATOR AS EVIDENCE. — Where a will is proved to have once existed, and the testator retained custody of it, or had ready access to it, and it cannot be found after his death, a legal presumption is raised that it was destroyed by him, with the intention to revoke it, and his declarations are admissible to destroy such presumption or to support and strengthen it. *Id.*

See EXECUTORS AND ADMINISTRATORS, 5-10; TRIAL, 2; TRUSTS AND TRUSTEES.

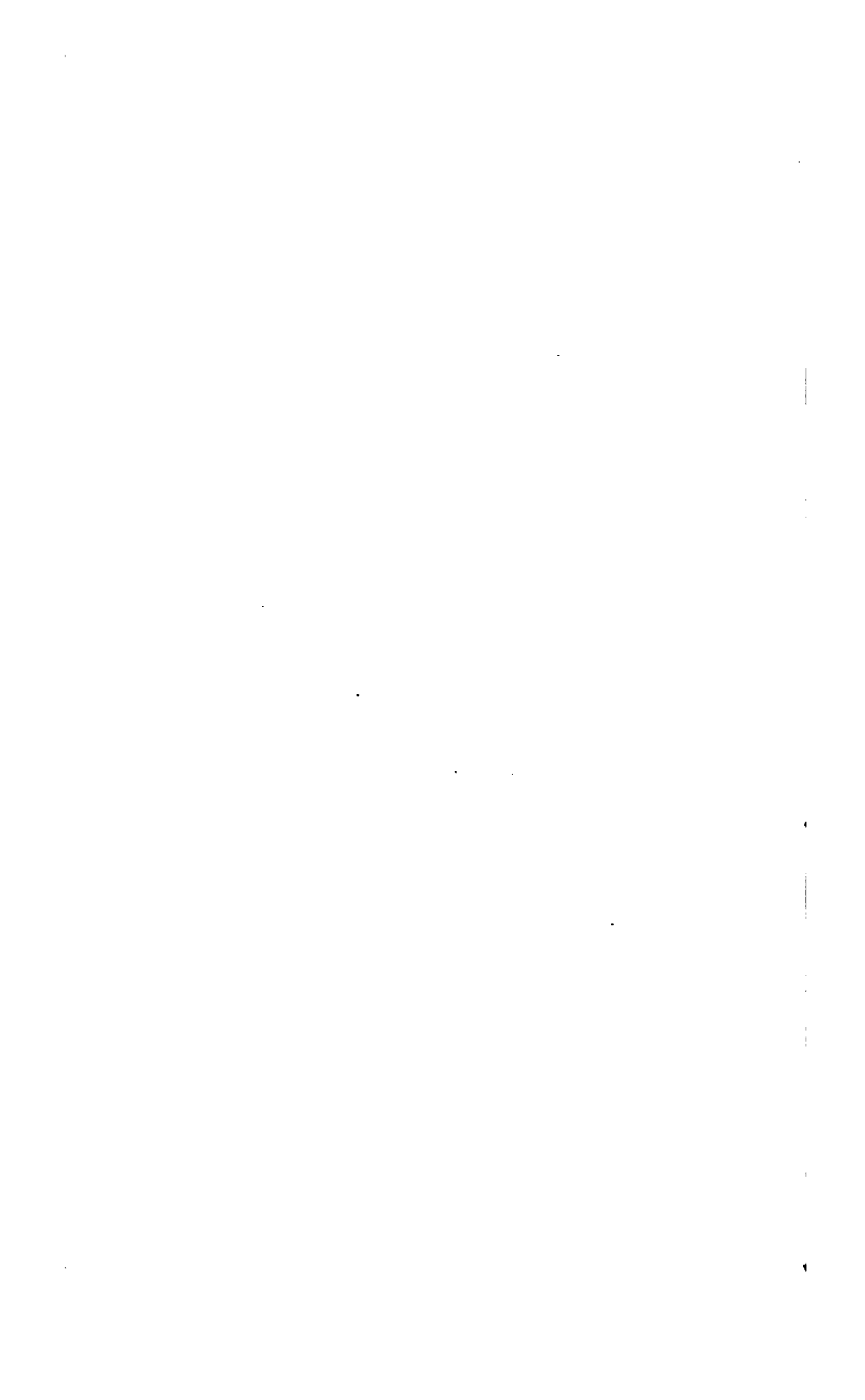
WITNESSES.

See INSURANCE, 19; TRIAL, 8.



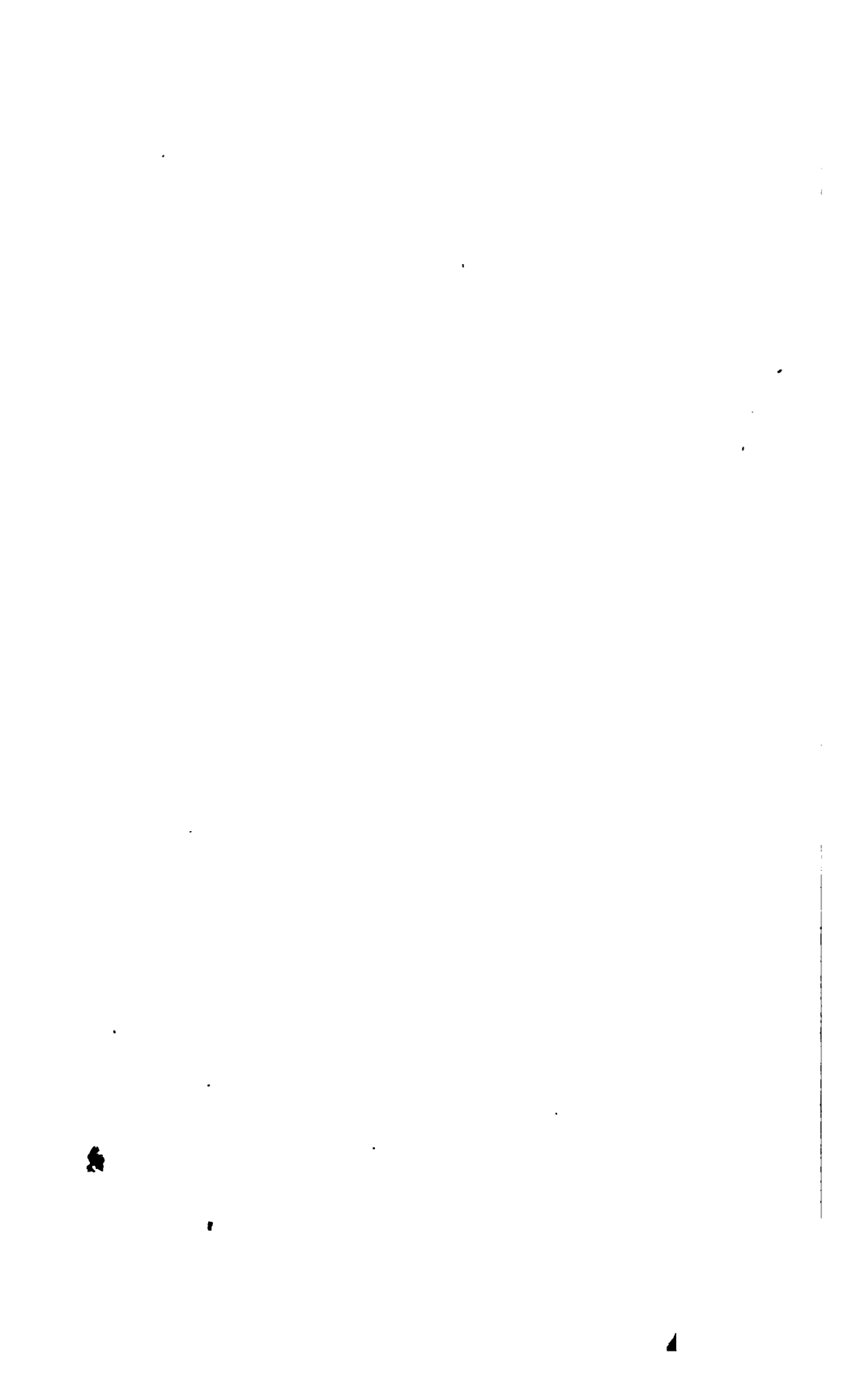














3 6105 063 241 603

